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CURRENT TOPICS.

We print this week the case of Debenham v. Mellor, recently decided in the House of Lords, which has created a good deal of discussion in the lay press, which seemed to that this adjudication established a novel principle in the law of husband and wife. Even *The Nation*, which is usually well informed on legal topics, fell into this error, in common with many papers of less note. This circumstance is an index to value of lay opinion on legal subjects. Of course it is not to be feared that the professional reader will be misled by such erroneous statements, and it is not our purpose to correct such by reporting the case in full. The decision will necessarily become a leading case on the question considered, both because of the eminence of the tribunal by which it was decided, and because the opinion deals with and harmonizes all the preceding adjudications upon similar topics. We append a note to show that the current of the American authorities, particularly the able and learned opinion of Mr. Justice Cooley, in Clark v. Cox, 32 Mich. 204, are incomplete consonance with the doctrine there laid down.

It is a misfortune that the lay press should so frequently fall into egregious error when it undertakes to deal with legal subjects. It is, to a great degree, the instructor of the people upon this subject, and as it is desirable that the public should have correct general ideas of the law, so it is a public need that the press should be careful to inform itself before speaking *ex cathedra* on legal subjects.

The relation of lawyer and client, and the legal consequences incident thereto, are, as a matter of course, of perennial interest to the profession. In view of this fact, we reprint in the current issue an article from the *Irish Law Times*, which is replete with much curious and some useful information in relation to lawyers' fees. At some time in the near future, we will endeavor to give our readers the results of the American adjudications on the same subject.

The levy of mesne process upon shares of stock in an incorporated company, was considered by the Supreme Court of Michigan in the case of Van Norman v. Jackson, decided on the 12th inst. The statutes of that State provide the method in which executions shall be levied upon stock, and that, upon the exhibition of the execution, the officer whose duty it is to keep a record of the stockholders, shall give a certificate of the number of shares held by the judgment debtor; and further, that an attachment should be levied "in the manner provided by law for the seizure of such property on execution." In the case in question, the attachment debtor had assigned his stock on the books of the corporation to his wife, in whose name it stood at the time of the levy. The attachment creditor, disregarding the assignment as fraudulent, made the levy, and then brought a bill for injunction to restrain the wife from transferring the stock or intermeddling with it. The court granted an order vacating the injunction, saying that the remedy by attachment is special and extraordinary, and that the statutory provisions in relation to it must be strictly construed; that the doctrine applies with special force to the subjection of shares of stock in incorporated companies to mesne process; that they are not leviable at common law, and that positive provisions are requisite to enable a court of common law to apply its power to them. That, being intangible entities incapable of caption by the gross methods of that system, they can not be safely proceeded against at law, unless the legislature provide specifically all the necessary means for attaining that object (Howe v. Starkweather, 17 Mass. 239; Blair v. Compton, 33 Mich. 414); that in this instance the debtor did not occupy, within the intent of the legislature, the legal *status* of a stockholder. Newbury v. Detroit, etc. Iron Co., 17 Mich. 141.

Our memory betrayed us last week into an unfortunate error concerning the date of the death of Mr. Isaac Grant Thompson which is of sufficient moment to deserve correction. We included him in the necrology of 1880. Our accuracy being questioned, we found from an examination of our files (9 Cent. L. J. 240), that he died August 30, 1879.

SUBSIDIZED ADVOCACY.

"Religion and law indeed should cost nothing, or nearly nothing to the individual," says Rousseau, in Landor's Imaginary Conversations. Scarcely less visionary is the figment on which was founded the doctrine that, as Sir John Davies hath it, the lawyer's fee was to be regarded "not in the nature of wages or pay due by contract for labor or service—since no price or rate can be set upon counsel which is invaluable—but of a gift or gratuity, which albeit an able client might not neglect to give without note of ingratitude, the worthy counselor might not demand without doing wrong to his reputation." It was taken for granted that your windy orator could live upon air, while, of course, his motives in the exercise of his calling should be equally ethereal; nor was it imaginable that the learned Silvertongue should hold gold of any account. Nay, rather, it was laid down by the judicious Hooker that, "if they who travail about the public administration of justice, follow it only as a trade, with an unquenchable and unconscionable thirst for gain, being not in heart persuaded that justice is God's own work, and themselves his agents in this business; the sentence of right God's own verdict, and themselves his priests to deliver it; formalities of justice do but serve to smother right, and that which was necessarily ordained for the common good is, through shameful abuse, made the cause of common misery." And though such an exalted estimate is not often nowadays expressed of the vocation of the advocate, it is still possible to find some who hold, with the late Judge Redfield, that "mere money-making, except as the natural result of professional advancement, mere political office, however high, he will regard as things not to be listened to for a moment, as base and degrading bribes, which a true man should spurn with the same loathing which he would an attempt to corrupt his faith or his honor." Faith—honor—what mean they, indeed, if advocacy is to be followed as a mere money-making trade, and if that it is not sufficiently money-making, renders it "unreasonable" to expect counsel to fulfill their engagements, as they can not "afford" to do so? We contemptuously spurn this sordid and ignominious notion, and protest that any advocate, sheltering perfidy by such a subterfuge, would be unworthy of his gown.

At the same time, we fully concede the shadowy nature of the considerations, which certainly have not the like currency now as formerly, on which the honorary character of a barrister's fees was founded; but, for the very reason that the so-called *honorarium* must now be regarded in a more practical and matter-of-fact aspect, more ordinary and natural should be the obligations of those who vend their voices and vehemence for hard cash, "*iras et verba locant.*" A Martial may, no doubt, find scope for humor in describing your mercenary lawyer; and the profession is but too accustomed to such sneers as that of him who said: "You only give your counsel a simple breviate of your cause; he returns you a dubious and uncertain answer by which you find him indifferent which side he takes. Have you feed him well that he may relish it the better, does he begin to be really concerned, and do you find him truly interested and zealous in your quarrel? His reason and learning will by degrees grow hot in your cause; behold an apparent and undoubted truth presents itself to his understanding; he discovers a new light in your business, and does in good earnest believe and persuade himself that it is so." "You give good fees, and those beget good causes," it is said in the *Spanish Curate* of Beaumont and Fletcher; and Addison will have it that lawyers "are more or less passionate according as they are paid for it, and allow their client a quantity of wrath proportionable to the fee which they receive from him." "A counselor-at-law once asked me," says Huarte, "'what the cause might be, that in the affairs where he was well pald, many cases and points of learning came to his memory; but with such as yielded not to his travail what was due, it seemed that all his knowledge was shrunk out of his brain.' Whom I answered, 'that matters of interest appertained to the wrathful faculty, which maketh its residence in the heart, and if the same receive not contentment, it doth not willingly send forth the vital spirits, by whose light the figures which rest in the memory may be discerned; but when that findeth satisfaction, it cheerfully affordeth natural heat, wherethrough the reasonable soul obtaineth suffi-

cient clearness to see whatsoever is written in the head.' " But, despite the warning of the fable against seeking the shadow while possessing the substance, we would not only insist that the lawyer's wrathful faculty should receive practical contentment, but that his fees should retain their merely honorary character. "It contributes," observes Coleridge, "to preserve the idea of a profession, of a class which belongs to the public, in the employment and remuneration of which no law interferes, but the citizen acts as he likes, *foro conscientiæ.*"

Not only were the rewards of the advocate's services deemed by the Roman law, not *merces*, but *honoraria*, though from the time of Alexander Severus, the advocate might prosecute for payment by means of an *extraordinaria cognitio;*[1] but in France such fees are regarded as merely honorary, though there, also, they might anciently have been recovered by action. In Scotland, Lord Bankton was of opinion that such an action lay, but, "though the action be competent for such gratification, advocates who regard their character abhor such judicial claims, and keep in their mind the notable saying of Ulpian upon the like occasion: *Quædam enim tametsi honeste accipiantur, inhoneste tamen petuntur.*" Now, however, the law is there generally understood to be, that an advocate "cannot demand or recover by action any remuneration for his services, although in practice he receives *honoraria* in return for these services;"[2] but action has been held competent for the annual salary of an advocate as standing counsel.[3] In Canada we find it held by the Court of Appeals, in 1878, that when a barrister who is also an attorney deals directly with a client, he can recover for his services, even though a part of the service rendered may be for advocacy; but where a counsel is retained by an attorney, he cannot bring an action for his fee.[4] And in a recent American case, where an attorney, who was not a counselor, was held entitled to recover compensation under a special contract for his services, as they did not pertain to advocacy, Beasley, C. J., delivering the judgment of the Supreme Court of New Jersey, in 1878, while admitting that the weight of the American decisions is in favor of considering the English doctrine, even as it relates to advocates, as obsolete and inapplicable to the times, added: "All I wish to say is, that I cannot concur in this view; for the rule in question has always flourished in full vigor as a part of the common law, and has never, during any interval of time, fallen into disuse; and that, as its only foundation was its supposed efficacy in sustaining the honorable standing of the advocate, I can by no means admit that such a rule is alien to the professional ethics of this country. The principle that an advocate cannot stipulate with his client for his perquisites, is one of the established customs of our inherited jurisprudence, and is entirely consistent with our social conditions, and, therefore, in my opinion, is not to be eliminated except by legislation."[5] After the exhaustive decision in Kennedy v. Broun and wife,[6] and the full and lucid treatment of the subject in Pollock's Principles of Contract (and see Forsyth's Hortensius, 2d ed., 372), it would be inexcusable supererogation to enlarge here upon the familiar English doctrine; and our readers are possessed of ample means of judging for themselves whether its "supposed efficacy in sustaining the honorable standing of the advocate" has been found substantial in this country.[7]

It is to the circumstance that the barrister's fee is an *honorarium*, and irrecoverable by legal process, that his irresponsibility for the misconduct of a cause, even by gross ignorance or negligence, has been commonly attributed.[8] But, says Mr. Campbell,[9] "this is of course no reason. For, as I have shown in regard to mandate (of which the retainer of counsel is a species), it matters not that the skilled service is undertaken gratuitously.

[1] Dig. 50. 13, 1, s. 10; Maynz, s. 301-303.
[2] Per Inglis, L. P., Batchelor v. Mackersy, 1876; 13 Scot. Law Reporter, 664.
[3] Mackenzie v. Town of Burntisland, M. 11, 421.
[4] M'Dougall v. Campbell, 14 Can. L. J., (N. S.) 213.
[5] Schomp v. Schenck, 11 Vroom, 7 R. 22; and see Seeley v. Crane. 3 Green, 35; Vanatta v. M'Kinney's Executors, 1 Harr. 235.
[6] 13 C. B. (N. S.) 677; 32 L. J. 137; see Broun v. Kennedy, 33 L. J. Ch. 71; 33 Beav. 133; 4 D. J. & S. 217.
[7] See Mulligan v. Macdonogh, 5 Ir. Jur. (N. S.) 101, 2 L. T. (N. S.) 136; Robertson v. Macdonogh, 14 Ir. L. T. R. 108; *Re* Hickie, 1 Ir. L. T. 795; Lysaght v. Magrath, 14 Id. 569; Hobart v. Butler, 9 Ir. C. L. R. 157; Bradford v. Roulston, 8 Id. 468; M'Cullagh v. Green, 1 Alc. & N. 5.
[8] Swinfen v. Lord Chelmsford, 1 F. & F. 619; 5 H. & N. 390.
[9] Law of Neg., 2d ed. 46.

The fact is, that the privilege of a barrister is altogether anomalous, and is due to the peculiar history and traditions of the profession." The saying is, that the advocate's gown is his mandate; and of old the pouch appended at the back of that garment used to be employed as a receptacle for the client's *douceur*, of which the advocate of course knew nothing. But, anomalous indeed is his presumed mandate when, as held in Scotland, he is not liable in damages for appearing without the authority of the party at all, while the agent who instructs him without authority is liable in the expenses caused by the unauthorized appearance, both to the party for whom the appearance is made and to his opponent.[10] And anomalous indeed is the irresponsibility for mismanagement which the mandate confers,[11] when the law allows the advocate to demand fees from his client, no matter how exorbitant, on the pretense of a contract, no matter how special, yet deprives the client of redress on the ground that the contract is a myth and the fee a delusion. If just this be, its justice might be better appreciated, were the doctrine rested on a different reason. It might be said that an advocate is bound to accept a brief for any party who retains him, unless already retained by his opponent, or on account of some other reasonable excuse; or, as the old Scotch law has it, "that thir foresaidis procuratouris procure for every man for thair wagis, bot giff thai have reasonable excuss."[12] So where a Scottish advocate refused to appear against the President of the Court, he was ordained to do so on pain of deprivation;[13] and the court has suspended advocates for not appearing when cited before it.[14] And at common law, the courts certainly of old claimed the power to make barristers act, whether they would or no, for him who would retain them, "just as a servant is compellable to serve."[15] On indictments for murder, the judge's request to counsel to give his honorary service to the prisoner, is even still regarded as practically mandatory.[16] And in an American case we find it laid down, that "it is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the court, when not inconsistent with their obligations to others; and for compensation they must trust to the future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law."[17] But if, even in a criminal case, counsel is at liberty, notwithstanding an express contract in consideration of a special fee, to refuse to attend "without any reasonable cause in that behalf," as held in Robertson v. Macdonogh;[18] any defense of the doctrine of counsel's irresponsibility founded on his supposed obligation to act, whether he will or no, necessarily fails; while a new opprobium may be cast on "a profession wherein a man may, without shame, seek to justify the wicked for reward, and take away the righteousness of the righteous from him."[19] Yet, we doubt not that such is the law of the land, extending though it does to an extreme length, the scope of the decision which was called by Giffard, L. J., "a landmark of the law on this subject;"[20] and so counsel, acting "as he likes *foro conscientiæ*," may "lowp away like a flea in a blanket," as was said of the levanting lawyer in "Redgauntlet." "'Did ever anyone hear,' said Fairford, 'of an advocate being compelled to return to his task, like a collier or a salter who has deserted his master?' 'I see no reason why he should not,' said Redgauntlet, dryly, 'unless on the ground that the services of the lawyer are the most expensive and least useful of the two.'" But, even poor Peter Peebles seems to have felt dubious whether he could sustain his complaint for malversation in office, for he threw out that he might not insist on more than the refunding of the fees. In this too, however, he would fail. In Turner v. Phillips,[21] Lord Kenyon said that "whether Mr. Phillips would choose to return the fee or not, was for

[10] Cowan v. Farnie, 14 S. 634; see Robertson v. Ross, 11 M. 910; Wallace v. Miller, 1 S. 43.
[11] Batchelor v. Mackersy, *ubi supra*.
[12] A. S. 27 May, 1532; see Batchelor v. Mackersy, *ubi supra*.
[13] Lord Balmerino v. Forrester, M. 341.
[14] A. S. 23 June, 1756.
[15] 21 H. vi. 4*a*.
[16] See Harris Crim. L. 431; 13 Amer. L. Rev. 359.
[17] Rowe v. Yuba County, 17 Cal. 63; and see Wayne County v. Waller, 8 R. 598; 7 W. N. 377.
[18] 14 Ir. L. T. R. 108.
[19] Felix Holt.
[20] Mostyn v. Mostyn, 5 Ch. 457.
[21] Peake's R. 122.

his own consideration; but if the case was to proceed, he should feel himself bound to interpose" (*i. e.*, by withdrawing it from the jury). And Mr Mackay, in his most able and exhaustive work on the practice of the Court of Session,[22] says that the general opinion is "that the same rule holds in Scotland, the ground being either that the fee is an *honorarium*, or that some services are presumed to have been rendered, although they may not have been those for which the fee was sent. Counsel may, therefore, according to existing practice, retain the full fee, though he does not attend the hearing of the cause owing to another engagement. When he has no other engagement, he is bound to attend. The opinion occasionally stated, that an advocate may consider himself retained, and his fee paid, merely to deprive the opposite party of his services, has never been approved by any court." It redounds to the honor of the Irish bar, however, that in practice unearned fees are now, with extremely rare exceptions, not retained. In "The Lawyer," by the lamented Edward O'Brien, it is said: "He is careful to return his fee in any matter in which, from accident or other cause, he has given no labor or thought; the contrary practice in which regard, has deservedly brought much scandal upon his calling." In England, too, we are glad to have reason to believe, fair mindedness in this regard is almost universal. When Baron Lionel de Rothschild was seeking admission to parliament, before the removal of Jewish disabilities, it was at one time intended that he should be heard by counsel. The late Sir Fitzroy Kelly was early retained by Baron de Rothschild, and came over from France partly in order to be present. The retainer paid was 1,000 guineas; and when it was resolved to dispose of the case in another way, and not to hear counsel at all, the solicitors applied for the return of the fee, and Sir Fitzroy Kelly placed it at the disposal of Baron de Rothschild, who begged Sir F. Kelly to accept 500 guineas in compensation for the inconvenience to which he had been put, and 100 guineas for his trouble in advising. And never was reward more excellently earned, from the days when first

> "On smooth and polished stones, a sacred ring,
> The elders sat, and in their hands their staves
> Of office held, to hear and judge the cause;
> While in the midst two golden talents lay,
> The prize of him who should most justly plead."

No doubt, there may be shocking and unseemly exceptions to a rule so general and just; but, if so, it can only be assumed that they have incurred the unqualified censure of the profession. There may be exceptions, flagrant and defiant, in which an artificial privilege has been strained to its uttermost tension, and abused with scandalous impunity; and sometimes they may have failed even to come under public notice. But, is it credible that no Nemesis should have attended upon them, and that they should have been suffered to remain a blot upon the bar, whose noblest reward has ever been the respect that is won by worth alone? It may be so, but the fact should not be assumed without positive proof, while neither should the contrary be assumed merely because the bar forbears from action,

> "And Friendship, like an old acquaintance, sends
> To his friend Justice, that she should be mild
> And look with eyes of mercy on the fault."
>
> —*Irish Law Times.*

EFFECT OF DESTRUCTION OF BUILDINGS ON CONTRACT FOR SALE.

It is a well-settled principle that when a house has been casually destroyed, the loss must be borne by the owner of the property. While this general proposition has never been questioned, there frequently arise disputes as to who must be considered, in the eye of the law, as the real owner. Take the familiar and practical case where there has been a contract for sale of a lot of land with buildings thereon; but before the deed of conveyance has been executed, the house is destroyed by fire—who is the owner, and who is liable for the loss? The business portion of any community would, as a rule, consider the property as belonging to the vendee from the date of the contract, provided the title proves good and there are no stipulations in the agreement respecting the happening of such an event. It is in consequence of this feeling that the vendee so frequently inserts clauses as to insurance and liquidated damages. These precautions are not always taken, and the house is sometimes burnt, neither party being in fault, before delivery of the deed, and without any understanding as to liability. Has the vendor, upon refusal of vendee to comply, a right to recover the whole purchase-money upon

[22] Vol. 1, 116.

tender of the deed? To this question, Equity says yes; but the Law answers decidedly in the negative. Before presenting the grounds of this wide difference of opinion, we would state that much will, of course, in the solution of this question, depend on the particular circumstances of each case. There may simply have been an oral agreement to purchase, provided the title proves good; and perhaps on the other hand, a contract unde seal, with acceptance of title, payment of consideration, possession of property—everything complete, except legal transfer of title; and there may be modifications of these two classes. Many cases can be at once determined by the application of the statute of frauds; for where the vendor is thereby prevented from enforcing the contract, and the vendee avails himself of such defense, there can be no doubt as to the vendor's liability. Many others can be also eliminated in consequence of the fact that the contract itself fixes the liability; for it is not unusual, as stated above, to make provisions as to the effect of damage to, or destruction of buildings by fire, *e. g.*, by whom the same shall be repaired or rebuilt, the allowance to be made for damage thus occasioned, or perhaps a right to rescind, etc. Such clauses obviate an appeal to the courts. We have, therefore, left for consideration and dispute, those contracts which are not affected by the statute of frauds, and which are silent as to the solution of this question. What say the courts? Should the vendor ask a court of equity to decree specific performance, he would succeed upon the ground that the vendee was in equity the owner of the estate, therefore liable for the loss. But should he first apply to the courts of law for damages, his complaint would be dismissed, because, as the legal title was still in him, he alone must bear the loss. Now, which is the true rule, and commends itself to our reason. In Seton v. Slade, 7 Ves. 265, Lord Eldon said "that in equity the estate, from the sealing of the contract, is the real property of the vendee; that it descended to his heirs, and was devisable by his will." He was thus invested with many of the incidents of ownership. "Equity," says Duncan, J., in Richter v. Selin, 8 S. & R. 425, "looks upon things agreed to be done as actually performed; consequently, when a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee for the vendor for the purchase-money. So much is the vendee considered, in contemplation of equity, as actually seized of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance, and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is owner of the premises to every intent and purpose in equity." In Paine v. Meller, 6 Ves. 349, where A had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him. In Robb v. Mann, 1 Jones, 300, the vendee was made to bear the consequences of a similar loss. The equity of this rule is that, as the vendee profits by any accidental rise in the value of the property, he must also lose by any accidental depreciation.

It is no defense to a bill in equity for the specific performance of a contract for the sale of lands, that since the contract was made, the land has become more valuable. Falls v. Carpenter, 1 Dev. & Bat. Eq. (N. C.) 237; Young v. Wright, 4 Wis. 144. At law the vendor is owner of the property until the deed of conveyance is signed, sealed and delivered—by the agreement for sale he only receives a right of action for damages—and he will not be permitted to recover the stipulated purchase-money, when a portion of the property has been destroyed, on the ground that the sale is not yet complete, and it will be impossible for him now to convey all that he promise'. Thompson v. Gould, 20 Pick. 134, frequently cited in this connection, was primarily decided on the point that the parol agreement in that case was void by the statute of frauds; but the court went on to argue that the vendor could not anyhow obtain specific performance, because he was no longer able to perform his part of the contract, and that the loss must be borne by him, as the property remained vested in him at the time of its destruction. In Wells v. Calnan, 107 Mass. 514, Mr. Justice Gray laid down the principle, that if the owner of a house and land agrees to sell and convey it upon payment of a certain price, which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor can not perform the agreement on his part, he can not recover or retain any part of the purchase-money.

There may be other cases in point, but the above citations present, with reasonable fairness, the respective positions of the two courts. Shall law or equity prevail? Our first impression is surprise at their apparently anomalous attitudes—equity enforcing what seems a hard bargain, and the law resorting to equitable principles to relieve an unfortunate vendee from his contract under seal. Further investigation and thought shows us the true meaning and sound sense of the equitable doctrine. Take an example: Suppose the contract is sealed, the consideration paid, receipt given, premises occupied, but, owing to a not uncommon delay, the delivery of the deed has not taken place. Now, if the courts of law are to be maintained, the vendee can, even at this stage, refuse the tender of the title and recover his purchase-money, on the ground that the sale can not be completed. Would this be justice? Would it not be opposed to common sense and the general opinion of mankind? This would be carrying legal technicality rather too far. Again, in Wells v. Calnan it is assigned as a ground for dismissing the vendor, that owing to the fire the estate was not worth two-thirds as much as before the contract—this brings up the question of adequacy of consideration. There can be no doubt that if, with-

out fraud, there were great defects in the property before or at the time of the contract, such as made the price grossly inadequate, the vendee must be relieved. But the courts of law seem to have lost sight of the fact that the only inadequacy of price, which will operate to prevent the specific performance of a contract, must be inadequacy existing before or at the time of the sale. The cases mentioned in Kent, vol 2, p. 468, and the conclusions drawn therefrom apply emphatically to houses not in existence at the time of the contract. It seems to us a fair inference that he would have been of a different mind, if the loss had been after the contract. It is a poor rule that will not work both ways. Suppose the property mentioned in Wells v. Calnan, instead of depreciating one-third, had risen two-thirds in value. Does any one for a moment say that for that reason the court would compel the vendee to pay two-thirds more than the stipulated consideration? Is it not settled that the vendor can not avail himself of the defense that since the contract the property has become more valuable? If then the vendee profits by any accidental rise in the value of the property, should he not in all conscience and equity lose by any accidental depreciation? The vendor should surely have some rights and privileges. The courts of law also make use of the argument that the vendor can not convey what he promised. Are the buildings in this case considered separately and as personal property? If so, then surely the law itself has held that the title to personalty passes at the time of sale or of delivery, and any loss after that time will be the loss of the vendee. But is not the land the essence of the contract, and the buildings merely accessory? Can not the vendee still give title to the land, and was not all the delay in examination of title and drawing of papers occasioned by the fact that this was a contract for the sale of real estate and not of personalty? We surely think these questions will be answered in the affirmative by every one. The views and practice of our business men ought certainly to have weight in the decision of this question. Nine out of the ten men who deal largely in real estate, make their arrangements upon the understanding that the house must be considered as the vendee's from the time of the contract, and always take the precaution of having the same insured. It has been universally conceded that the vendee under a contract for sale has an insurable interest. If then he is so much the owner of the house as to pocket insurance money in case of destruction by fire, must it not be his loss if he neglects to take out an insurance policy? It is for the interest of the community that this important question should be authoritatively decided one way or the other. As inferred from the above, we are strongly inclined towards the equitable doctrine, but we do not assume to have treated the subject exhaustively. We simply present the case as it appears to us. The purpose of this article is merely to call attention to the conflict between the two courts, with a hope that some effort will be made to reconcile their differences, and establish a uniform principle, upon which implicit reliance could be placed.

E. A. MARSHALL.

CONTRACT — CONSIDERATION — FRAUD — DURESS.

SOLINGER v. EARLE.*

New York Court of Appeals, December, 1880.

The plaintiff, in pursuance of a secret agreement with defendants, entered into to induce them to unite with the other creditors of a firm (one of the members of which was his brother-in-law) in a composition of the debts of the firm, gave them his negotiable note for the residue of the debt beyond the amount to be paid by the composition agreement. The defendants, having signed the composition, transferred the note before maturity to a *bona fide* holder. Plaintiff having been compelled to pay it, sued to recover the money paid, alleging that the defendants, taking an unfair advantage of his natural love and affection for his brother-in-law, and his solicitude to aid in the compromise, extorted the giving of the note. *Held*, that the agreement referred to was a fraud upon the other creditors, as much as if made directly between the debtor and such creditor, and being void as against public policy, the courts could not aid either party as against the other. *Held*, as to the claim of duress, that that doctrine can only be asserted in behalf of the debtor himself, or of a wife or husband or near relative of the blood of the debtor, who intervenes in his behalf, and that a person in the situation of the plaintiff can not be deemed to have paid under duress.

Abraham Kling, for appellant; *Wm. M. Ivins*, for respondents.

ANDREWS, J., delivered the opinion of the court:

The plaintiff, to induce the defendants to uni with the other creditors of Newman and Bernhard in a composition of the debts of that firm, made a secret bargain with them to give them his negotiable note for a portion of this debt beyond the amount to be paid by the composition agreement. He gave his note pursuant to the bargain, and thereupon the defendants signed the composition. The defendants transferred the note before due to a *bona fide* holder, and the plaintiff, having been compelled to pay it, brings this action to recover the money paid. The complaint alleges that the plaintiff was the brother-in-law of Newman, and entertained for him a natural love and affection, and was solicitous to aid him in effecting the compromise, and that the defendants, knowing the facts and taking an unfair advantage of their position, extorted the giving of the note as a condition of their becoming parties to the composition. We think this action cannot be maintained. The

*See S. C. 13 Jones & Sp. 80, 604.

agreement between the plaintiff and the defendants to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition, was a fraud upon the other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character.

A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay one of the creditors more than his *pro rata* share to induce him to unite in the composition, is as much a fraud upon the other creditors, as if the agreement was directly between the debtor and such creditor. It violates the principle of equity and the mutual confidence as between creditors, upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement, to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction. If the defendants here were plaintiffs, seeking to enforce the note, it is clear that they could not recover. Cockshott v. Bennett, 2 T. R. 763; Leicester v. Rose, 4 East, 372. The illegality of the consideration, upon well-settled principles, would be a good defense. The plaintiff, although he was cognizant of the fraud and an active participator in it, would nevertheless be allowed to allege the fraud to defeat the action; not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts on the application of a party to the illegality. But if he had voluntarily paid the note, he could not, accordingto the general principle applicable to executed contracts void for illegality, have maintained an action to recover back the money paid. The same rule which would protect him in an action to enforce the note, would, in case the note had been paid, protect the defendants in resisting an action to recover back the money paid upon it. Nellis v. Clark, 4 Hill, 429. It is claimed that the general rule that a party to an illegal contract cannot recover back money paid upon it, does not apply to the case of money paid by a debtor, or in his behalf, in pursuance of a secret agreement exacted by a creditor in fraud of the composition; and the cases of Smith v. Bromley, 1 Doug. 696; Smith v. Cuff, 6 M. & Sel. 160; and Atkinson v. Denby, 7 H. & N. 934, are relied upon to sustain this claim. In Smith v. Bromley, the defendant being the chief creditor of a bankrupt, took out a commission against him; but afterwards, finding no dividend likely to be made, refused to sign the certificate unless he was paid part of his debt; and the plaintiff, who was the bankrupt's sister, having paid the sum exacted, brought her action to recover back the money paid, and the action was sustained. Lord Mansfield, in his judgment, referred to the statute (5 Geo. II. chap. 30, sec. 11), which avoids all contracts made to induce a creditor to sign the certificate of the bankrupt, and said: "The present is a case of a transgression of a law made to prevent oppression, either on the bankrupt or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted, and advantage taken of her situation and concern for her brother." And, again, "if any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage, and torturing the compassion of his family." In Howson v. Hancock (8 T. R. 575), Lord Kenyon said that Smith v. Bromley was decided on the ground that the money had been paid by a species of duress and oppression, and the parties were not *in pari delicto*, and this remark is fully sustained by reference to Lord Mansfield's judgment. Smith v. Cuff was an action brought to recover money paid by the plaintiff to take up his note given to the defendant for the balance of a debt owing by the plaintiff, which was exacted by the latter as a condition of his signing, with the other creditors, a composition. The defendant negotiated the note, and the plaintiff was compelled to pay it. The plaintiff recovered. Lord Ellenborough said: "This is not a case of *par delictum;* it is oppression on the one side, and submission on the other; it never can be predicated as *par delictum* where one holds the rod and the other bows to it." Atkinson v. Denby was the case of money paid directly by the debtor to the creditor. The action was sustained on the authority of Smith v. Bromley and Smith v. Cuff.

It is somewhat difficult to understand how a debtor who simply pays his debt in full can be considered the victim of oppression or extortion, because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not *in pari delicto* (see remark of Parke, B., in Higgins v. Pitt, 4 Exch. 312). But the cases referred to go no further than to hold that the debtor himself, or a near relative, who, out of compassion for him, pays money upon the exaction of the creditor, as a condition of his signing a composition, may be regarded as having paid under duress, and as not equally criminal with the creditor. These decisions can not be upheld on the ground simply that such payment was against public policy. Doubtless the rule declared in these cases tends to discourage fraudulent transactions of this kind; but this is no legal ground for allowing one wrongdoer to recover back money paid to another in pursuance of an agreement between them void as against public policy. It was conceded by Lord Mansfield in Smith v. Bromley, that when both parties are equally criminal against the general laws of public policy, the rule is *potior est conditio defendentis;* and Lord Kenyon, in Howson v. Hancock, said that there

is no case where money has been actually paid by one of two parties to the other upon an illegal contract, both being *particeps criminis*, and an action has been maintained to recover it back. It is laid down in Cro. Jac., 187, that: "A man shall not avoid his deed by duress of a stranger, for it hath been held that none shall avoid his own bond for the imprisonment or danger of any one than himself only." And in Robinson v. Gould, 11 Cush. 57, the rule was applied where a surety sought to plead his own coercion, as growing out of the fact that his principal was suffering illegal imprisonment, as a defense to an action brought upon the obligation of the surety given to secure his principal's release. But the rule in Cro. Jac. has been modified so as to allow a father to plead the duress of a child, or a husband the duress of his wife, or a child the duress of the parent. Wayne v. Sands, 1 Freeman, 350; 1 Roll. Abr. 687; Jacob's Law Dict., "Duress."

We see no ground upon which it can be held that the plaintiff in this case was not *in pari delicto* in the transaction with the defendants. So far as the complaint shows, he was a volunteer in entering into the fraudulent agreement. It is not even alleged that he acted at the request of the debtor. And in respect to the claim of duress, upon which Smith v. Bromley was decided, we are of opinion that the doctrine of that and the subsequent cases referred to, can only be asserted in behalf of the debtor himself, or of a wife or husband or near relative of the blood of the debtor who intervenes in his behalf, and that a person in the situation of the plaintiff, remotely related by marriage with a debtor, who pays money to a creditor to induce him to sign a composition, can not be deemed to have paid under duress by reason simply of that relationship, or of the interest which he might naturally take in his relative's affairs. The plaintiff can not complain because the defendants negotiated the note so as to shut out the defense which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given, as the words of negotiability show. It is possible that the plaintiff, while the note was held by the defendants, might have maintained an action to restrain the transfer and to compel its cancellation. Jackson v. Mitchell, 13 Ves. 581. But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although under the coercion resulting from the transfer, the law leaves him where the transaction has left him.

The judgment should be affirmed. All concur.

NOTE.—It is a well settled principle in the law of contracts that where the amount of a liquidated debt is due, it can only be discharged by a payment in full, and that an agreement to accept from the debtor a part in full payment of the entire debt, is without consideration—*nudum pactum*—and constitutes no defense in an action for the unpaid portion. Fitch v. Sutton, 5 East, 230; Bunge v. Koop, 48 N. Y. 225; Cole v. Sackett, 1 Hill, 517; Muldon v. Whitlock, 1 Cow. 306; Hawley v. Foote, 19 Wend. 516; Cumber v. Wane, 1 Strange, 426; Stone v. Lewman, 28 Ind. 97; Ogborn v. Hoffman, 52 Ind. 439; 2 Chit. Contr. 1101. The foundation of the rule seems to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate, with legal impunity, his promise to his debtor, however freely and understandingly made. But this rule which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied. Hence the courts have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due. Brooks v. White, 2 Met. 283; Miller v. Holbrook, 1 Wend. 317; Bateman v. Daniels, 5 Blackf. 71; Sibree v. Tripp, 15 M. & W. 23; Fitzgerald v. Smith, 1 Ind. 310; McKenzie v. Culbreth, 66 N. C. 534. Thus if an obligor pay a less sum than is due before the day specified (Smith v. Brown, 3 Hawk. 580), or at another place than is limited by the condition (Smith v. Brown, 3 Hawk, 580); or if the debtor accept a collateral thing in satisfaction of the debt (Pinnel's Case, 5 Co. 117; Andrew v. Boughey, 1 Dyer, 75; Thompson v. Percival, 5 Barn. & Adol. 925; Boyd v. Hitchcock, 20 Johns 76; Anderson v. Highland, Tp. Co. 16 Johns. 86; Bateman v. Daniels, 5 Blackf. 71); or other security, though for a less sum than the original debt (Le Page v. McCrea, 1 Wend. 164); but a security of equal degree for a smaller sum, if it present no easier or better remedy, can not be pleaded in satisfaction for the larger one; thus the giving of a promissory note for £5, can not be pleaded as a satisfaction of a debt of £15; Cumber v. Wane, 1 Strange, 426); or the note of a third person for a less sum than the debt due (Kellogg v. Richards, 14 Wend. 116); or if the debt be not for a liquidated amount (Wilkinson v. Byers, 1 Adol. & El. 106; Bateman v. Daniels, 5 Blackf. 71); or where a general composition is agreed upon (McKenzie v. Culbreth, 66 N. C. 534), it is a valid discharge on the ground of accord and satisfaction. 1 Bac. Abr. 41 *a*, note.

Every composition deed is in its spirit, if not in its terms, an agreement between the creditors themselves as well as between them and the debtor. It is an agreement that each shall receive the sum, or the security which the deed stipulates to be paid or given, and nothing more, and that upon this consideration the debtor shall be wholy discharged from all debts then owing to the creditors who signed the deed. Breck v. Cole, 4 Sandf. 79. The agreement by one creditor to give up part of his debt, is regarded as the consideration to support a like agreement made by another creditor. Mutuality between the creditors, as respects the consideration, is, therefore, an essential element in determining the validity of an agreement for composition. The creditors must "join together." They must stipulate one with another. Sage v. Valentine, 23 Minn. 102; Perkins v. Lockwood, 100 Mass. 249; Norman v. Thompson, 4 Exch. 755; Good v. Cheeseman, 3 Barn. & Adol. 328; Eaton v. Lincoln, 13 Mass. 424; Steinman v. Magnus, 11 East, 390; Dunchy v. Goodrich, 20 Vt. 127; Boothbey v. Snowden, 3 Camp. 175; Smith v. Graydon, 29 How. Pr. 224; Tatlock v. Smith, 6 Bing. 339; Pierson v. McCahill, 21 Cal. 122; Gardner v. Lewis, 7 Gill. 377; Farrington v. Hogdon, 119 Mass. 453; Paddieford v. Thatcher, 48 Vt. 574;

Murray v. Snow, 37 Iowa, 410. But it is not essential that the creditors should meet each other, or, by communication one with the other, agree before signing the composition deed. The agreement will be equally binding if the deed is taken to each separately and signed by him. Leicester v. Rose, 4 East, 372; Fawcett v. Gee, 3 Anst. 910; Cullingworth v. Lloyd, 2 Beav. 385; Bean v. Amsinck, 10 Blatchf. 361; Hall v. Merrill, 5 Bosw. 266. A contract between the debtor and a creditor for a secret preference is a fraudulent contract. Such agreements are held void, both by courts of law and courts of equity, and are not enforced, even against the assenting debtor, or his sureties, or his friends. Public policy, and the interests of unsuspecting and deceived creditors, forbid the enforcement of such secret agreements; and it makes no difference whether threats or oppression were used to induce the debtor to consent to the secret agreement, or whether he was merely a volunteer, offering his services and aiding in the intended deception. Bean v. Amsinck, 10 Blatchf. 361, 369; 1 Story Eq. Jur. §§ 378, 379; Clark v. White, 12 Peters, 178, 199; Russell v. Rogers, 10 Wend. 473, 479; Wiggin v. Bush, 12 Johns. 306, 309; Bean v. Brookmire, 1 Dillon, 151, 154; Dangleish v. Tennent, L. R. 2 Q. B. 48, 54. An action at law cannot be maintained against the debtor on a note or bond given for a secret preference, and he may set up the fraud as against the creditor or any other person who is not a *bona fide* holder for value, before maturity. Lawrence v. Clark, 36 N. Y. 128; Carroll v. Shields, 4 E. D. Smith, 466. Equity will decree the surrender of securities given by the debtor for secret preferences (Pleyer v. Browne, 28 Beav. 391; O'Shea v. Collier White Lead & Oil Co., 42 Mo. 397), and the cancellation of notes or bonds given by him to induce a creditor to sign a composition agreement. Middleton v. Lord Onslow, 1 P. Wms. 768; Spurrett v. Spiller, 1 Atk. 105; Constantein v. Blache, 1 Cox Ch. Cases, 287; Fawcett v. Gee, 3 Anst. 910; Estabrook v. Scott, 3 Ves. 456; Jackman v. Mitchell, 13 Ves. 581; Cecil v. Plaistow, 1 Anst. 202. Not only are such secret agreements not enforced, but money paid under them is allowed to be recovered back by the debtor, as having been obtained in violation of the principles of public policy, and affirmative relief is given to the debtor against such agreements, even where they are not forbidden by an express statute. Smith v. Bromley, Doug. 696, note; Jackman v. Mitchell, 13 Ves. 581; Wood v. Barker, L. R. 1 Eq. Cas. 139; Bean v. Amsinck, 10 Blatchf. 361, 370. Nor is it material whether the secret agreement gives to the favored creditor a larger sum, or an additional security or advantage. Estabrook v. Scott, 3 Ves. 456; Constantein v. Blache, 1 Cox, Ch. Cases, 287; McKenty v. Gladwin, 10 Cal. 227. If the debtor pays the creditor the money at the time when he signs the composition agreement, or gives the creditor a note, which is indorsed, before maturity to a third person, who compels him to pay it, he may maintain an action to recover the amount from the creditor. Gilmore v. Thompson, 49 How. Pr. 198; Atkinson v. Denby, 6 H. & N. 778; s. c. 7 H. & N. 934; Bean v. Amsinck, 10 Blatchf. 361; Bean v. Brookmire, 2 Dill. 108; Turner v. Hoole, Dow. & Ry. (N. P.) 27; Alsager v. Spalding, 4 Bing. (N.C.) 407; Smith v. Cuff, 6 M. & Sel. 160; Bradshaw v. Bradshaw, 9 Mee. & W. 492. In order to recover in such a case, however, he must show that he himself paid the money, and not merely that it was paid by another; for the basis of such an action is that the creditor has received money to which he was not entitled. Bradshaw v. Bradshaw, 9 Mee. & W. 29. If he gives a note to the creditor at the time of signing the agreement, and afterwards pays it to the creditor, he can not recover the money; for such a payment is a voluntary payment. Wilson v. Ray, 10 Ad. & El. 82; Bradshaw v. Bradshaw, 9 Mee. & W. 29. If he chooses to pay the note, instead of resisting its enforcement when he has a good defense, he can not invoke the aid of the law to recover the money. If he is sued upon the note, and omits to set up the fraud as a defense to the action, he can not recover the money from the creditor after the latter has thus obtained it from him by virtue of legal proceedings. Money so recovered is received to the use of the successful party, by authority of law. Whatever error may have been in the suit, the debtor is estopped from proving it after failing to do so at the time. Wilson v. Ray, 10 Adol. & El. 82. If he gives two notes, a judgment on one does not prevent him from setting up the fraud in an action upon the other. Hughes v. Alexander, 5 Duer, 488. It has been held that, if the debt consists of a judgment, he can not maintain an action to compel the creditor to satisfy the judgment (Moses v. Katzenberger, 1 Handy, 46), and that he can not maintain an action upon a covenant in the composition agreement to indemnify him against notes given to the creditor, and by him indorsed to third parties. Higgins v. Pitt, 4 Exch. 312. But if he can maintain an action founded upon the fraud, there seems to be no good reason why he may not maintain an action upon the contract, although that is tainted with fraud, and the policy of the law will be subserved by preventing the creditor from deriving any advantage from his fraud in one case as much as in the other.

As the right of the debtor to money paid as a secret preference rests upon the coercion by means of which it is taken from him, it would seem to follow that the right of action is complete at the moment of payment, and can not be affected by the fact that the debtor never obtains the signature of all the creditors, where that is required, or makes default in paying the composition-money. Alsager v. Spalding, 4 Bing. (N. C.) 407; s. c. 204; 1 Arn. 181. See, also, Ward v. Bird, 5 Car. & P. 229, and Bradshaw v. Bradshaw, 9 Mee. & W. 29. If it appears that the debtor, instead of merely submitting to oppression, has been guilty of any other independent fraud, then he is not entitled to invoke the aid of the law for relief against a secret preference. If he obtained the composition fraudulently, by concealing a part of his assets, he can not maintain an action against the creditor to recover the money paid to him as a secret preference. Armstrong v. Mechanics' Nat. Bank, 6 Biss. 520. If the debt arose through fraud and a breach of trust on his part, he can not invoke the aid of a court of equity to compel the surrender of a security given to secure the payment of a secret preference. Small v. Brackley, 2 Vern. 602. If the composition-money is to be paid in installments, and notes are given therefor, the debtor has the right to have money paid as a secret preference credited on the notes. Lenzberg's Policy, L. R. 7 Ch. Div. 650. But if money is at the time applied to pay a secret preference, a party, who becomes surety for a debt subsequently contracted, is not entitled to have it appropriated to relieve him from his liability. Feldman v. Gamble, 26 N. J. Eq. 494. A creditor who takes a note (Cockshott v. Bennet, 2 T. R. 763; Jackson v. Lomas, 4 T. R. 166; Case v. Gerrish, 32 Mass. 49; Ramsdell v. Egerton, 49 Mass. 227; Lothrop v. King, 62 Mass. 382; Carroll v. Shields, 4 E. D. Smith, 466; Townsend v. Newell, 22 How. Pr. 164; Hughes v. Alexander, 5 Duer, 488; Lawrence v. Clark, 36 N. Y. 128; Patterson v. Boelm, 4 Pa. 507; Fay v. Fay, 121 Mass 561; Howe v. Litchfield, 85 Mass. 443), or bond (Cecil v. Plaistow, 1 Anst. 202; McFarland v. Garter, 10 Ind. 151) from the debtor, or from a third party (Coleman v. Walter,

3 Younge & J. 212), as a secret preference, can no maintain an action thereon; for the law never lends its aid to enforce a fraudulent contract. If he takes a mortgage to secure the payment of the secret preference, he can not maintain any legal proceedings to foreclose it. Feldman v. Gamble, 26 N. J. Eq. 494. A subsequent promise to pay the secret preference is without consideration, and will not enable the creditor to maintain an action on the fraudulent contract. Cockshott v. Bennett, 2 T. R. 763. If the creditor receives a bill of exchange, accepted by a third party, which is not paid at maturity, and then, upon the default in payment, takes an assignment of a policy of insurance on the debtor's life, he can not maintain an action on the covenant to pay the premiums thereon. Geere v. Mare, 2 H. & C. 339. If he takes two notes as a secret preference, obtains judgment upon one, and then gets from a third party a guaranty for the payment of the sum due upon both notes, upon a surrender of the note and judgment, he can not maintain an action on the guaranty. Clay v. Ray, 17 C. B. (N. S.) 188. Although the debtor fails to obtain the signature of all the creditors to a composition agreement which contains a clause that it shall be void if all do not sign it, yet a creditor can not maintain an action upon a note given as a secret preference, for the note is fraudulent in its inception, and can not be made good by subsequent events. Wells v. Girling, 4 Moore, 78; Harvey v. Hunt, 119 Mass. 279. If the debtor omits to tender the composition money in consequence of a secret agreement for a preference; the creditor can not enforce a note given as a secret preference, on the ground that there has been a default, for his consent is a waiver of the default. Townsend v. Newell, 22 How. Pr. 164. If the creditor takes two notes as a secret preference, and a judgment is rendered in favor of the debtor, in an action on one, where he sets up the fraud as a defense, this is conclusive evidence of the fraud between the same parties in an action on the other note. Higgins v. Mayer, 10 How. Pr. 363. If a creditor takes a single contract for the payment of the secret preference note and the composition-money, he can not maintain an action thereon, for the fraud vitiates the entire contract. If he takes a note in part for the secret preference, and in part for the composition-money, he can not enforce it. Eldridge v. Strong, 34 N. Y. Sup. Ct. 491; Sternburg v. Bowman, 103 Mass. 325. If the payment of the composition-money is to be unsecured, and he secretly gets an indorser, or surety, upon a note for the same amount as the others are to receive, he can not maintain an action thereon to recover the money. Leicester v. Rose, 4 East, 372; *Ex parte* Sadler, 15 Ves. 52; Coleman v. Waller, 3 Younge & J. 212; Pinneo v. Higgins, 12 Abb. Pr. 334; Stuart v. Blum, 28 Pa. 225. But see *Contra*: Feise v. Randall, 6 T. R. 146; s. c. 1 Esp. 224. If the composition agreement is for an extension merely, with notes payable at certain times, a creditor who takes notes to mature before those times can not maintain an action thereon. Smith v. Owens, 21 Cal. 11. Even if the creditor takes separate notes for the secret preference and the composition-money, yet he can not enforce the composition notes; for he makes one contract for both the secret preference and the composition-money, and a part being fraudulent, the whole contract is altogether fraudulent and void. Howden v. Haigh, 11 Adol. & El. 1033; s. c. 3 Per. & Dav. 661; Doughty v. Savage, 28 Conn. 146; Eldridge v. Strong, 34 N. Y. Sup. Ct. 491; Pendleburg v. Waller, 4 Young & Col. 424; Williams v. Schrieber, 21 N. Y. Sup. Ct. 38. If the secret preference consisted of a bill of exchange, accepted by a third party, he can not enforce the composition note although he has not collected the money on the bill. Howden v. Haigh, 11 Adol. & El. 1033; s. c. 3 Per. & Dav. 661. If a creditor, by a promise of a secret preference, induces another creditor to enter into a composition, and accept of an assignment of the debtors' property to him as trustee, he can not recover the composition-money to which he would otherwise be entitled; for he is a party to a fraudulent arrangement which defeats his claim. Frost v. Gage, 85 Mass. 560. If the debtor omits to tender the composition-money to the creditor, in pursuance of a secret agreement for a preference, the creditor can not claim that there is such a default as revives the original debt, and thus in effect enforce the fraudulent agreement; for his consent is a waiver of the default, and he can not derive any advantage from it. Townsend v. Newell, 22 How. Pr. 164; Bean v. Amsinck, 10 Blatchf. 361. Although there is no such consent, yet the debt of a creditor who has received a secret preference is not waived by a default in the payment of the composition money. The composition agreement is operative against the creditor, but not for him. It extinguishes his debt, but gives him no right to the composition-money. Hence, as to him there can be no default. *Ex parte* Oliver, 4 DeG & Sm. 354; *In re* Cross, 4 DeG. & Sm. 364. When the composition agreement however provides, that it shall be void unless all the creditors sign it, the debt will be deemed to be revived after a recovery of the money paid as a secret preference, if all the creditors did not sign it. Brookmire v. Bean, 3 Dill. 136. A creditor who has become a party to a deed of composition, and afterward discovers that there has been a secret preference given to another creditor, may consider the contract rescinded and sue on the original demand. Kahn v. Gumberts, 9 Ind. 430; Partridge v. Messer, 14 Gray, 180.

FRANK W. PEEBLES.

HUSBAND AND WIFE—NECESSARIES—REVOCATION OF AUTHORITY TO PLEDGE HUSBAND'S CREDIT—NOTICE.

DEBENHAM v. MELLOR.

House of Lords, November, 1880.

The mere fact of cohabitation is not sufficient to give a wife an implied authority to pledge her husband's credit for necessaries; and it is not necessary for the husband to prove that a tradesman supplying his wife with goods knew that he had prohibited her from pledging his credit. Jolly v. Rees, 12 W. R. 473, 15 C. B. (N. S.) 628, followed and approved.

Appeal by the plaintiffs against the judgment of the Court of Appeal, affirming the judgment of the Queen's Bench Division.

The action was brought to recover the price of articles of dress supplied by the plaintiffs to the defendant's wife during cohabitation, the articles being necessaries suited to her rank in life. The defendant had forbidden his wife to pledge his credit, but this prohibition was not known to the plaintiffs.

Bowen, J., before whom the action had been tried, entered judgment for the defendant, and

his judgment was affirmed by the Court of Appeal, consisting of Baggallay, Bramwell and Thesiger, L.JJ. See 28 W. R. 501, L. R. 5 Q. B. Div. 394.

The plaintiffs appealed to this House.

The facts in evidence are more fully stated in the judgment delivered by the Lord Chancellor.

Benjamin, *Q. C.*, and *A. L. Smith*, for the appellants.—

When a husband and wife are living together, the latter is always presumed to have authority to pledge her husband's credit for all necessaries suitable to the station of the parties. This apparent or ostensible authority can not be secretly revoked, and therefore it was for the respondent to show that the revocation of his wife's authority to pledge his credit was known to the appellants. It is submitted that the judgment of the Court of Appeal clothes the wife with no more authority than a servant. Much of the language in the judgments in Manby v. Scott, 2 Sm. L. C. 450, is favorable in the appellants' contention. [Lord SELBORNE, C.—In that case the wife had been living apart from the husband without any justification.] In Dyer v. East, 1 Mod. 9, Lord Chief Justice Kelynge spoke of the decision in Manby v. Scott as being "a hard judgment," and he also said that "the husband must pay for the wife's apparel, unless she elope and he give notice not to trust her." In Etherington v. Parrot, 1 Salk. 118, Lord Chief Justice Holt said, "While they cohabit, the husband shall answer all contracts of hers for necessaries, for his assent shall be presumed to all necessary contracts upon the account of cohabiting, unless the contrary appear." In Comyn's Digest, tit. "Baron and Feme," Q., it is stated that, "if a wife buy necessary apparel for herself, the assent of the husband shall generally be intended." Bolton v. Prentice, 2 Str. 1214, shows that a husband who fails to supply his wife with necessaries, is not relieved from liability even by the fact that he has forbidden credit being given to her. In Waithman v. Wakefield, 1 Camp. 120, Lord Ellenborough told the jury that, "where a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value." Montague v. Benedict, 3 B. & C. 631, may be relied upon on the other side, but there the goods furnished were not necessaries. In Holt v. Brien, 4 B. & Ald. 252, the plaintiff had express notice that the defendant made his wife an allowance; but Mr. Justice Bayley said that, "if a husband makes no allowance to his wife, and he gives to her a general credit, she may contract debts for the necessary supply of herself and family, for which he will ultimately be liable." In Read v. Legord, 6 Ex. 636, it was held that a husband was liable for necessaries supplied to his wife even while he was a lunatic, and the judgment of Mr. Baron Alderson is founded upon the consideration that the marriage contract imposes upon the husband an absolute obligation to support his wife. Ruddock v. Marsh, 5 W. R. 359, 1 H. & N. 601, establishes the authority of the wife to bind her husband in matters which are ordinarily under a wife's control; and in Johnson v. Sumner, 6 W. R. 574, 3 H. & N. 261, Lord Chief Baron Pollock observed that, "if a man and his wife live together, it matters not what private agreement they may make; the wife has all usual authorities of a wife." [Lord BLACKBURN.—In that case the court declined to set aside the nonsuit.] In the present case the judges in the courts below held that they were bound by Jolly v. Rees, 12 W. R. 473, 15 C. B. (N. S.) 628; but in that case there was evidence that the defendant had given his own orders for goods supplied for the use of the household. This House is not, however, bound by that case, which was the first in which a secret revocation of the wife's authority was held to be an answer to a claim for goods supplied to her. It is submitted that the decision of the majority of the judges in the Court of Common Pleas, is in conflict with Ruddock v. Marsh. Mr. Justice Byles differed from the other members of the court, and in Morgan v. Chetwynd, 4 F. & F. 451, Lord Chief Justice Cockburn appears to have doubted whether the decision of the Court of Common Pleas was correct.

Willis, *Q. C.*, and *McCall*, for the respondent.—The mere fact of marriage gives the wife no implied authority to pledge her husband's credit, except where the latter has, through no fault of the wife, neglected to supply her with necessaries; and, therefore, it was for the plaintiffs to give some evidence which would warrant an inference of assent or ratification by the defendant. The observations made by Lord Chief Baron Pollock in Johnson v. Sumner were not necessary for the decision of the case. Seaton v. Benedict, 5 Bing. 28, governs the present case. Lord Chief Justice Best there said: "A husband is only liable for debts contracted by his wife, on the assumption that she acts as his agent. If he omits to furnish her with necessaries, he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he sees her wear it without disapprobation. In the present case the husband furnished his wife with all necessary apparel, and he was ignorant that she dealt with the plaintiff." In Reneaux v. Teakle, 1 W. R. 312, 8 Ex. 680, Mr. Baron Martin observed that the wife's implied authority to pledge her husband's credit, "is only a presumption arising from cohabitation, and may be rebutted," and that, "if a husband tells his wife that he will not permit her to have a particular kind of dress, she can not bind him by ordering it." Reid v. Teakle, 12 C. B. 627, shows that the plaintiff must prove, in a case like the present, not only that the goods supplied were necessaries suitable to the defendant's station in life, but also that the wife had either an express or implied authority to bind the husband by her contracts. In Atkyns v. Pearce, 2 C. B. (N. S.) 763, 5 W. R.

C. L. Dig. 184, Mr. Justice Cresswell, said that the decision in Ruddock v. Marsh, could only be sustained upon the supposition that the wife had acted with the husband's cognizance. Jolly v. Rees is precisely in point, and has been unquestioned for sixteen years. In the recent case of Eastland v. Burchell, L. R. 3 Q. B. D. 432, 26 W. R. Dig. 101, Mr. Justice Lush described the wife's authority to pledge her husband's credit as "a delegated, not an inherent, authority."

They also referred to Dennys v. Sargent, 6 C. & P. 419; Atkins v. Curwood, 7 C. & P. 756; Spreadbury v. Chapman, 8 C. & P. 371; Mizen v. Pick, 8 C. & P. 373 (note); Freestone v. Butcher, 9 C. & P. 643; Shoolbred v. Baker, 16 L. T. (N. S.) 359.

Benjamin, Q. C., replied.

Lord SELBORNE, C.—This appeal raises the very important question whether the case of Jolly v. Rees, which was decided by the Court of Common Pleas in 1864, and (so far as I am aware) has never since been seriously questioned, was correctly determined. The point decided in that case, as I understand it, was this—that the question, whether a wife has authority to pledge her husband's credit, is to be treated as a question of fact, to be determined upon the circumstances of each particular case, whatever may be the rules of law as to the *prima facie* presumptions to be drawn from a particular state of circumstances. That principle is now controverted, and the first question for your lordships to decide is this, whether the mere fact of marriage implies a mandate by law, making the wife (who can not herself contract, except so far as she may have a separate estate) the agent in law for the husband, to bind him and to pledge his credit by what might be her own contract if she were a *femc sole*. It is sufficient to say that all the authorities show that there is no such mandate in law, except in a case of necessity, which necessity may, perhaps, arise when the husband has deserted the wife, or has compelled her to live apart from him without properly providing for her; but can not, when the parties are living together, be said ever *prima facie* to arise, because, if, in point of fact, she is maintained, there is no *prima facie* evidence that the husband is neglecting to discharge his particular duty, or that there can be any necessity for the wife to run him into debt for the purpose of keeping herself alive, or supplying herself with necessary clothing; I therefore lay aside the proposition that the mere fact of marriage implies a mandate, such as is contended for on behalf of the appellants.

The next question is, does the law imply a mandate from cohabitation? and, if it does, on what principle does it do so? Cohabitation is not, like marriage, a *status* or a new contract, but it is a general expression for a certain condition of facts; and, if the law does imply such a mandate, it must be as an implication of fact, and not as a necessary conclusion of law. No doubt, there are authorities which say that the ordinary state of cohabitation carries with it some presumption, some *prima facie* evidence of an authority to do those things which, in the ordinary circumstances of cohabitation, it is usual for a wife to have authority to do. Mr. Benjamin says that those words are not the best that might be used for the purpose, but that "apparent authority" or "ostensible authority" would be better. Those words may be very good words for the ordinary state of circumstances in which the case of cohabitation between husband and wife exists, out of which the presumption arises, because in that state of circumstances the husband may be said to do, or to evidently consent to, acts which hold out his wife as his agent for certain purposes, and then the word "apparent" or "ostensible" becomes appropriate; but where the husband neither does, nor consents to, anything to justify the proposition that he has held out his wife as his agent, then I take it that the question, whether he has, as a matter of fact, given his wife authority, is one which must be examined upon all the circumstances of the case.

No doubt a husband, though he has not intended to hold out his wife as an agent, and though she may not actually have had any authority, may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority. If he has done so, he may be liable; but the question must be examined as one of fact, and all the authorities, as I understand them, practically so treat it when they speak of this as a presumption *prima facie*, not absolute, not in law, but capable of being rebutted; and when Lord Chief Baron Pollock, in Johnson v. Sumner, said that all the usual authorities of a wife under those circumstances might be assumed, notwithstanding any private arrangement, I apprehend that he had in view that state of facts during cohabitation, when a wife is managing her husband's house and establishment, which usually raises a presumption which, no doubt, when once raised by the husband's acts or by his assent to the acts of his wife, might not, as against the person relying upon that appearance of authority, be got rid of by a mere private agreement between husband and wife.

In Reneaux v. Teakle, which was also cited during the argument, Lord Chief Baron Pollock said that the case of a wife did not differ, at any rate in principle, from that of any one else in an establishment. If there is an establishment of which there is a domestic manager (although, perhaps, the wife is the most natural domestic manager, and the presumption may be strongest when she is so), yet the presumption is the same if such domestic manager is not a wife, but merely a woman living with a man, whether with or without an assumption of the name of wife. Again, the principle is the same if the domestic management is delegated to a housekeeper, or a steward, or any other kind of servant; and therefore in all cases the question must be one of fact.

In the present case that state of circumstances

is wanting, which usually accompanies cohabitation. There was no establishment, and no living upon credit for the ordinary necessary purpose of providing for the daily wants of a household, so as to raise the ordinary presumptions. The husband and wife were both servants of a company which owned a hotel at Bradford, in which they lived; and therefore there was, in fact, no domestic management. The credit was given by a firm of London tradesmen to a woman living at Bradford, and there was nothing to show that the appellants were dealing upon the faith of any appearance of authority in the wife; for they made out all the bills in her name, which, no doubt, would not have prevented them from resorting to the husband, if otherwise liable, but which certainly does not assist their case as tending to show that they were misled by any appearance of authority into the belief that they were giving credit to him. It is clear that the husband knew nothing about the ordering of the goods; and the necessary conclusion of fact is that he never, by any act or consent, held out his wife as having authority, to the appellants or to any other tradesmen.

If, then, the appellants can recover at all, it must be because there was either an authority in fact, or an authority in law, implied from the necessity of the case. I think it may well be doubted, whether the ordinary presumption even shows the authority in the state of facts which I have mentioned; but, taking it to be so, since the clothes might be necessary for the wife, and it would be the husband's duty to supply them if there were no other means of doing so, the evidence conclusively shows that there was, in fact, no authority. It appears that, more than four years before the appellants had any dealing with the wife, when the husband and wife were living in Devonshire, some other people gave credit to the wife as the respondent's agent; but it is not suggested that the appellants knew of this. The respondent disapproved of this state of things, and put a stop to it, expressly revoking any authority which he might have previously given to his wife; and he afterwards made her an allowance sufficient for any necessary purposes of dress, according to the state of his circumstances and condition of life. It is urged that the appellants had no notice of this revocation; but then they had no notice of the circumstances which made the revocation necessary. They only knew that their customer was a married woman, and her authority to bind her husband as his agent, if it had ever been given, had ended four years earlier.

Then comes the question whether the husband can be made liable because the articles supplied were in some sense necessaries. As to this, it is clear that, when a reasonable allowance is made, as in this case, by the husband to the wife, no authority at law to bind him can *ex necessitate* be implied on the part of the wife, even if she has purported to do so.

I must add, without going through the authorities, that if you regard the principles which run through all the cases, rather than casual *dicta*, which are necessarily colored by the particular facts before the judges, all the decisions will be found to be consistent with reason and justice, as well as with what was held by the majority of the Court of Common Pleas in Jolly v. Rees. I therefore propose to your lordships to dismiss the appeal, with costs.

Lord BLACKBURN.—If the case were not identical with that of Jolly v. Rees, I might think it necessary to address your lordships at greater length; but I should advise your lordships to act upon the view, that the majority of the Court of Common Pleas arrived at a right conclusion in deciding that case. No question arises here, any more than in Jolly v. Rees, as to what would have been the case if the wife had been left destitute, without an allowance suitable for her estate and condition, or if there had been desertion and cruelty. This is merely a case where a husband and wife are living together, although not in fact keeping up any establishment, and where he has in fact made her an allowance which, so far as one can judge from appearances, is sufficient to supply her with all necessary clothing, and the jury were satisfied that he directed her not to pledge his credit.

The first question, therefore, is this,—whether the respondent's wife had, from her position as a wife, any authority to pledge her husband's credit, although such authority had been revoked by him. I admit that the fact of a man living with his wife always affords evidence that he intrusts her with such authorities as are ordinarily given to a wife. In the ordinary case of the management of a household, the wife is the manager, and with such tradesmen as a butcher or a baker, she would have authority to pledge her husband's credit; but even then I do not think the presumption would arise, if the husband gave her the means to procure the articles without credit. In the present case, however, your lordships have to determine whether the wife had a mandate to order clothes, which it would be proper for her in her station of life to have, although the husband had forbidden her to pledge his credit, and had given her money to buy clothes.

For the reasons given by the majority of the Court of Common Pleas in Jolly v. Rees, and by the judges of the Court of Appeal in the present case, I am of opinion that there is nothing to authorize our holding that the wife had authority to pledge her husband's credit. I agree that if he knew that she had got credit, and had allowed the tradesmen to suppose that he sanctioned the transactions with them, it might well be agreed that there was such evidence of authority, that he could not revoke it without giving notice of the revocation to all who had acted upon the faith of his sanction. The general rule would be that which I have stated; but where an agent is clothed with an authority which is afterwards revoked, those who have dealt with him have a right to say,

unless the revocation has been made known to them, that the principal is precluded from denying the continuance of that authority, in the continuance of which he has induced them, as reasonable persons, to believe. There have been many cases where a husband has sanctioned his credit being thus pledged by his wife, but there is no such case here. I cannot agree with my brother Byles that the cases have established that the fact of a wife living with her husband alone entitles tradesmen to presume that the husband has given an authority which he is precluded from afterwards denying. I think that in such a case it is open to the husband to prove, if he can, that such an authority does not, in fact, exist, that being a question for the jury. This is not the case of the withdrawal of an authority which has been once given; but the question is, whether the appellants, who had never before dealt with either the wife or the husband, were entitled to assume that the authority was implied from the mere fact of cohabitation, and I do not think that the law gave them any right to do so.

Lord WATSON.—I need only say that, notwithstanding the able and ingenious argument of the counsel for the appellants, I think that, both upon principle and according to the authorities, Jolly v. Rees was rightly decided, and therefore I concur in the proposed judgment.

Judgment affirmed, with costs.

NOTE.—See the report of this case L. R. 5 Q. B. Div. 394. Though this adjudication created considerable remark at the time of its rendition, and many persons thought that it established a novel principle of jurisprudence, a cursory examination of the books will show that it is perfectly in accord with the current of authorities in this country as well as in England. See Seaton v. Benedict, 2 Sm. L. C. 439, and notes and cases cited; s. c. 5 Bing. 28. The leading American authority on the subject is the opinion of Mr. Justice Cooley in the case of Clark v. Cox, 32 Mich. 204. He says: "The points in difference between the parties in this case may be stated thus: The plaintiffs maintain that the wife is presumably the agent of the husband in the purchase of her own apparel, and of such articles of use and comfort for the family as are usually purchased by the wife rather than the husband; and that, while husband and wife are living together, a dealer who has no knowledge of any express limitations imposed by the husband on the wife's authority to make such purchases, may safely rely upon the legal presumption of her authority, and hold the husband liable on her purchases. The defendant, on the other hand, insists that the presumption goes no farther than this—that if the husband does not himself procure for her the necessary articles suitable to her and to his condition, or furnish her with money to procure them for herself, it is presumed he authorized her to purchase them on his credit; in other words, that any presumption that he authorizes her to employ his credit in the purchase of necessaries, is rebutted by his purchasing them himself, or giving her money for the purpose. And this was the view taken by the circuit judge. There can be no doubt, we think, that the authorities fully sustain the rulings of the court below;" and cites in support of this position, Manby v. Scott, 1 Sid. 109; Seaton v. Benedict, *supra*; Montague v. Benedict, 3 B. & C. 631; Holt v. Brien, 4 B. & Ald. 452; Reneaux v. Teakle, 8 Exch. 680; Reid v. Teakle, 13 C. B. 627; Jolly v. Rees, 15 C. B. (N. S.) 628; Richardson v. Dubois, L. R. 5 Q. B. 51; Mott v. Comstock, 8 Wend. 544; Kimball v. Keyes, 11 Wend. 33; Baker v. Barney, 8 Johns. 72; Cromwell v. Benjamin, 41 Barb. 558; Carey v. Patton, 2 Ashm. 140; Furlong v. Hysom, 35 Me. 332, and Rea v. Durkee, 25 Ill. 503. The reader may also consult upon this topic, Gotts v. Clark, 78 Ill. 229; Sulter v. Mustin, 50 Ga. 242; Woodward v. Barnes, 43 Vt. 330. EDITOR.

PRIORITIES OF EQUITIES—ACQUISITION OF TAX TITLE BY SECOND MORTGAGEE.

CONNECTICUT MUT. LIFE INS. CO. v. BULTE.

Supreme Court of Michigan, January 5, 1881.

1. The rule prohibiting one of two persons who are mutually interested in the same land from acquiring a tax-title to the prejudice of the other does not apply to first and second mortgagees.

2. And where the second mortgagee after foreclosing, but before the foreclosure of the first mortgage, acquires a tax-title to the premises, the first mortgagee can not recover in an action of ejectment against the tenant of the second mortgagee upon the theory that his foreclosure extinguished the second mortgage, and that the tax deed was wholly inoperative as against him, without tendering any re-payment of the tax, but leaving the whole loss to be borne by the second mortgagee.

3. If he does make such tender, claiming that the payment of the tax was for the common benefit, such a course will involve the admission that the amount paid went to increase the second mortgage, and left it a living, unextinguished lien, with the equity of redemption in the second mortgagee.

Moore, Canfield & Warner, for plaintiff in error; *George H. Lothrop, Edwin F. Conely*, and *G. V. N. Lothrop*, for defendant in error.

COOLEY, J., delivered the opinion of the court:

Bulte brought ejectment against the insurance company and one Hebert, its tenant, to recover certain lots in the City of Detroit. The facts out of which the litigation arose are the following:

On September 14, 1872, the lots were owned by one John F. Mack. On that day he executed to the plaintiff, Bulte, a mortgage on the lots for the sum of $4,750, and on November 25, 1874, he gave another mortgage to the insurance company for $9,000. Both mortgages were duly recorded. In May, 1877, the insurance company foreclosed its mortgage by *ex parte* proceedings and became the purchaser at the sale, and received a deed which became absolute May 26, 1878. In October, 1877, the land was sold for delinquent State and county taxes assessed in 1876, and William A. Moore became purchaser, subject to a year's redemption. No redemption ever took place. In December, 1877, Bulte foreclosed his mortgage by *ex parte*

proceedings, became the purchaser and took a deed which became absolute, December 15, 1878. December 21, 1878, Moore gave a quitclaim deed to the insurance company. His relations to the company at that time are explained in his evidence, which, being important, and all there was on the subject, is given in full. Mr. Moore testified that he was a lawyer by profession; that he had made loans for the Connecticut Mutual Life Insurance Company since 1871; that he had been their attorney in some suits at law, and had had some suits against them; that he did considerable general business for them as attorney; that the firm of Moore, Canfield & Warner, with which he is connected, have been the attorneys for said company in many cases for six or seven years past; that he negotiated the loan to Mack from the said company; that after making said loan the papers were all sent to the office of the company at Hartford, and the money was all payable to them there; that if the money was not paid, they generally wrote him to induce collection or payment by law or persuasion; that he looked after the loans of said insurance company in respect to the condition of the property, taxes, etc., to see that the property was not sold, to see that titles did not accrue in other hands against the company; that he generally bid in the lands in his own name, but by no special arrangement or anything of that kind; that he generally quitclaimed to the company when the property was sold; that he never executed a quitclaim to the company that he recollected, except this one, of any property that he ever bid in himself; that some property had been sold, and, where property had been sold, he conveyed to the party who purchased by deed or assignment of the certificates, whatever was necessary; that he generally drew his own check and paid the taxes himself; that in some cases he had been re-imbursed by the company, and in some not; where the company has held title, he has been re-imbursed; that for a year and a half, or two years past, the firm of Moore, Canfield & Warner had had the charge of the property, and paid the taxes and rendered the regular accounts, and the company re-imbursed them from time to time; that the mortgage Exhibit C came to him to be foreclosed after a portion was due; that he advertised it and conducted the proceedings to an end; that the property was advertised for foreclosure prior to the bidding in on the tax sale; that when he undertook to buy in the tax title, he was conducting the business of the company in respect to foreclosing their mortgage; that in purchasing property on tax sales he would not make a title adversely to the company; that he never would have assigned to anybody else; that he purchased the tax title because he thought under the circumstances he ought to do it; that he did not intend to create any title against the Connecticut Mutual Life Insurance Company, but that he did that as he did every other; that he did not go into the business of buying tax-titles; that he should not have permitted a title against the company; that he did not buy the title under any arrangement whatever with the company; that he did not receive anything from the company when he quitclaimed to it. On cross-examination, witness testified that, at the time of the purchase of this tax-title, he had no contract or arrangement with the Connecticut Mutual Life Insurance Company with regard to the purchase of this tax-title and no understanding with them about it; that the company knew nothing about it, and that the company never made any objection to his obtaining or holding title under the tax deed; that after he had conveyed to the company, he told the president that he had done so. On re-direct examination, witness testified that he did not consult with the company in each particular case of a tax-title. November 29, 1878, the insurance company leased a portion of the premises to Hebert, who took possession, and this suit was subsequently brought. On the trial the controversy appears to have centered entirely on the tax purchase by Mr. Moore and the effect of the subsequent conveyance by Mr. Moooe to the insurance company. The following instruction, requested by the defendant, the circuit judge refused to give: "The tax deed offered in evidence by the defendants is *prima facie* evidence of title in fee to the premises in question in William A. Moore, and the insurance company, as the grantee of said Moore, is entitled to assert all the title which the tax deed vested in said Moore." The following, requested by the plaintiff, was given: "If the jury find that at the time William A. Moore bid the premises off at tax sale, and took the tax deed, he was acting as the agent of the Connecticut Mutual Life Insurance Company, in reference to its mortgage interest in the premises, and in reference to its foreclosure by said company, and really acquired said tax bid and tax deed for the protection of the interests of said company, such tax deed vested no title or interest in Mr. Moore or in the defendants, which will prevent the recovery by the plaintiff in this action."

The jury returned a verdict for the plaintiff. The defendants, now plaintiffs in error, insist that the circuit judge wholly misapprehended the law, and that he erred both in holding that Bulte was at liberty to rely upon Moore's agency for the insurance company by precluding his making a purchase and acquiring a title in his own name at the tax sale, and also in ruling that the insurance company could not acquire and hold a tax-title as against a prior mortgagee.

We shall spend no time on a discussion of Mr. Moore's relations to the insurance comyany, because we think his deed to the company and the acceptance thereof was a recognition of his agency in the purchase, and renders immaterial the question which would otherwise have been the rights of Bulte. It will therefore be assumed, in whatever we shall say of the case, that the question of the right of a second mortgagee to recover in ejectment after foreclosure, is the question, and the only question in the case. It is conceded

that there are a great many cases in which parties standing in particular relations to the land, or to the owner or other person interested therein, are not suffered to acquire tax-titles and rely upon them as against other claimants. Some of those are very plain, and it is quite unnecessary to do more than name them. A tenant, for example, who has covenanted to pay the taxes can not be suffered to neglect this duty, and then acquire a tax title which shall cut off the title of his landlord. Neither shall the purchaser in possession under an executory contract be allowed to cut off the rights of his vendor by a like purchase, nor a mortgagor that of the mortgagee. A tax purchase, made when such a relation exists, is made in wrong; and the law in circumvention of dishonesty will conclusively presume that it was made in the performance of duty, and not in repudiation of it. But other cases are not so plain. A tenant in common, for example, who finds his interest taxed inseparable with that of his cotenant, may advance plausible reasons why, if he buys the whole land at a tax sale, he should be at liberty to claim title to the whole. His duty is limited to paying the tax on his share only; and if the cotenant neglect to pay for himself, what right has he to demand that those who happen to have interest with him in the land shall be excluded from the number who take advantage of his default? The reason usually assigned for not permitting such a purchase is that the sale is based in part upon the purchaser's own default; but it is also true that in a great proportion of such cases the parties stand to each other in confidential relations; and it may, without much violence to the facts, be assumed that they do so in all cases. No doubt, the rule that precludes their speculating in each others' defaults is grounded in sound policy. Still the purchaser does not lose what he pays beyond what is needful for discharging the lien upon his own interests; his co-tenants must refund to him such portion as is found to be just. Burhaus v. Van Zandt, 7 N. Y. 523; Phelan v. Boyland, 25 Wis. 679; Chickering v. Faile, 38 Ill. 342; Anson v. Anson, 20 Iowa, 55. The purchaser is trustee for the others, but they must repay their proportion of his advances. Lloyd v. Lynch, 28 Pa. St. 419; Maul v. Rider, 51 Pa. St. 317; Flynn v. McKinley, 44 Iowa, 68. But it is possible for parties to have antagonistic claims in lands, which place them, neither actually nor constructively, in confidential relations. In some such cases no doubt, either is at liberty to strengthen his title as against the other by a tax purchase. Blackwood v. Van Vleet, 30 Mich. 118. It is claimed that a second mortgagee occupies this position in respect to the first mortgagee, and if the latter does not protect his lien by payment of the taxes, or by attending as purchaser at the tax sales, the former is under no obligation to do so for him. And it is no doubt true that he is under no obligation to protect the first mortgagee; but the real point in controversy is, whether, if the second mortgagee pay the taxes or bid off the land, the payment or purchase will not *ipso facto* constitute a protection?

It certainly can not be said that the second mortgagee owes any duty to the first mortgagee to protect his lien as against tax-sale. Neither on the other hand does the first mortgagee owe any such duty to the second mortgagee, or to the owner. To the State each one of the three may be said to owe the duty to pay the taxes; and the State will sell the interest of all, if none of the three shall pay. As between themselves, the primary duty is upon the mortgagor; but if he makes default, either of the mortgagees may pay, and one of the two must do so, or the land will be sold and his lien extinguished. But in such cases, where each has the same right, payment by one is allowed to increase the amount of his incumbrance; for in no other way could he have security for its repayment by the mortgagor, who ought to protect the security he has given. When, therefore, each mortgagee has the same interest in making payment of the tax, and the same right to do so, and the same means of compelling repayment, it may well be held that a purchase by one shall not be suffered to cut off the right of the other, because it is based as much upon his own default as upon that of the party whose lien he seeks to extinguish. It is as just and as politic here as it is in the case of tenants in common, to hold that the purchase is only a payment of the tax. But in equity this can only be so, when the party paying is in the position to add the amount of the payment to the amount of his lien. It is never held that any other person can have the benefit of the mortgagee's payment or purchase without being under any obligation to repay him the cost. Horton v. Ingersoll, 13 Mich. 409, on which such reliance is placed, is far from so holding. In that case the owner of an interest in the equity of redemption was also owner of a tax-title. By reason of his tax-title he denied the right of the mortgagee to make him defendant to a bill to foreclose. The court decided he was a proper party by reason of his interest in the equity of redemption; and there was also a *dictum*, that the tax-title he had purchased "simply enures to the protection, not the destruction, of the regular title." The *dictum* is sound, but it falls short of the necessities of this case.

In this case the second mortgagee had acquired a tax-title, which became absolute in October, though the deed was not obtained until December 16, 1878. This, by the express provision of the statute, was *prima facie* a valid title. No doubt the first mortgagee had a right to insist that the purchase was in part for his protection, and to treat it as a payment merely; but this was at his option, and it stood as a good purchase as to all the world, except as to those who might have equities in respect to it, and who should see fit in proper mode and by the observance of suitable conditions, to arrest their equities. And one fundamental condition in every such case must be that the party claiming the benefit of the purchase shall do what

is equitable in respect to it. Bulte acquired his title December 15, 1878. On the supposition, apparently, that his foreclosure had extinguished both the insurance company mortgage and the tax purchase, and that the tax deed was wholly inoperative as against him, Bulte brought ejectment, without tendering any repayment of the tax or of any part thereof, but leaving the whole to be borne by the insurance company as a total loss. Is there any equity in this? Can a principle of law, which purports to be an equitable principle, support his suit? Why should the insurance company be charged as trustee for Bulte, and required to bear the burden of the trust for a party who takes all the benefits and assumes no part of the obligations? There is no answer to such questions. Sometimes a party by the force of circumstances is placed in a position where another may take the profit of his losses without being under obligation to make return; but the adjustment of legal rights on equitable principles is never meant to work such a result. The foreclosure of Bulte's mortgage no doubt would cut off that of the insurance company; but when he claims anything more than that, it is necessary to look about and see how and why he becomes entitled to it. The tax purchase was made before the sale on his foreclosure; but Moore, not the insurance company, was purchaser, and whatever the equities between him and the company, it can not be pretended that Moore was obliged to resign to the company, and the company to take and pay for the tax-title, in order that Bulte might obtain the benefit of it for nothing, and compel the company to add the cost to the loss of its mortgage. Moreover, the purchase in Moore's hands was subject to redemption until October, 1878, by either Mack or Bulte, and it was only after time for redemption had expired, that the sum paid at the tax sale could be deemed paid by the insurance company in satisfaction of the tax. Had redemption been made by any one, the effect upon the rights of parties respectively would be determined by the relation of the party redeeming to the title and to the interests of others. Had Bulte redeemed, the question now presented would not have arisen. He did not redeem his purchase on foreclosure, and by the time his title became absolute, the tax-title had become perfected. This title would relate back to the tax purchase in October, 1877, for all purposes of effecting substantial justice; but the fiction of relation will not be suffered to work a wrong. Blackwood v. Brown. 29 Mich. 483; Flint, etc. R. Co. v. Gordon, 41 Mich. 410. If Bulte took the land discharged of the insurance company mortgage, he had no shadow of claim to take it discharged of the tax purchase also. If the tax purchase attached itself to the insurance company mortgage as so much money, it would leave the mortgage, at least to that extent, unextinguished by the Bulte foreclosure; and if Bulte repudiated the tax purchase, and refused to recognize it as having been made for the common benefit, and made no offer to assume the expense, it would stand as a tax purchase against him. And at law the tax deed, giving a *prima facie* title, would constitute a perfect defense to the action of ejectment.

This disposes of the present suit. It seems proper to say, however, in view of all the facts, that there seems to be no difficulty in each party preserving all his equities. If Bulte claims that the tax purchase was made for the common protection of all interests in the estate, and proposes to accept all the burdens and responsibilities that flow from that fact, the insurance company can not insist upon the tax-title as a title against him. But he will make the claim for the first time after his mortgage has been foreclosed, and the claim itself will be an admission that, when the insurance company took the tax purchase off the hands of Moore, the amount paid went to increase its mortgage, and left it then a living and unextinguished lien. If it was cut off, there was nothing to which to add the cost of the tax purchase; and moreover if it was cut off, the insurance company was no longer mortgagee, and there was no equity entitling Bulte to insist that the purchase of the tax-title was a payment of the tax. Bulte's position, therefore, necessitates the admission that the equity of redemption is still in the insurance company; for if this is denied, there is nothing to preclude the insurance company buying and holding a tax title, as any mere stranger to the title might do. The inability to do so springs from the relation of mortgagee exclusively.

The judgment must be reversed with costs and a new trial ordered.

MARSTON, C. J., and GRAVES, J., concurred; CAMPBELL, J., did not sit in this case.

ABSTRACTS OF RECENT DECISIONS

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

INSURANCE CONTRACT — CONDITION PRECEDENT.—Where a party makes an application for a policy of life insurance, and the company accepts it, fills out the policy and sends it for delivery to its agent, the policy containing a stipulation that "this policy shall not take effect and become binding on the company until the premium be actually paid during the lifetime of the person whose life is assured:" *Held*, that no payment or tender of the premium by the representatives of the assured after his death can give vitality to the contract; that the company had the right, in accepting the application, to prescribe the terms upon which it was accepted, and it was for the applicant to assent to such terms or reject them; that the condition of payment of the premium in the lifetime of the assured was a reasonable con-

dition precedent to the liability of the company, which had a clear right to make it. Affirmed. Appeal from the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice SWAYNE.— *Giddings v. N. W. Mut. Life Ins. Co.*

FEME COVERT.—Under the Revised Statutes of the District of Columbia, sole and separate property of a wife can be conveyed by her by deed without the co-operation of her husband; but to make a valid conveyance or charge on her general property, her husband's signature is necessary. Where husband and wife joined in a deed charging the general estate of the wife for the note of her husband: *Held*, that such deed or mortgage should be enforced as a valid encumbrance upon the property. Affirmed. Appeal from the Supreme Court of the District of Columbia. Opinion by Mr. Chief Justice WAITE.—*Kaiser v. Stickney.*

PRACTICE—APPEAL—SUPERSEDEAS.—After a final decree there was an order allowing an appeal, but no security was taken, either for costs or for a *supersedeas*. On the sixtieth day after the rendition of the decree, a bond was approved by one of the justices of the court below, and filed with the clerk. This bond was for one thousand dollars, and was conditioned for a *supersedeas*. Some twenty days later, the same justice ordered the appellant to file an additional bond in the sum of $3.000, with surety, etc., within twenty days from that date; and appellant having offered the additional bond, asks for the writ of *supersedeas*, to prevent the court below from carrying into effect the decree appealed from. *Held*, that when the justice approved the bond and signed the citation, an appeal was allowed and security taken which operated as a *supersedeas*, transferring the jurisdiction of the cause from the lower to the higher court; that in approving the bond and signing the citation, he exhausted his power over the case, which, by those acts, passed from his jurisdiction to that of the appellate court. Motion for *supersedeas* denied without prejudice, etc. Appeal from the Supreme Court of the District of Columbia. Opinion by Mr. Chief Justice WAITE. —*Draper v. Davis.*

NEGOTIABLE PAPER—LIEN—JUDICIAL SALE—EQUITY OF REDEMPTION.—On the 1st day of October, 1868, C. C. Waite conveyed certain lots to G. N. Williams; and in part consideration for them, the latter executed his note for $30,000, payable four years after date, with interest, etc., to C. C. Waite; and to secure that note, made a deed of trust, conveying the lots to one Obadiah Jackson as trustee. The note in question was indorsed by C. C. Waite to Silas M. Waite, and by him to Obadiah Jackson, who also indorsed it in blank. On the 18th of April, 1871, Jackson borrowed from David Smith $31,500, giving the note in question as collateral security. On the 5th of April, 1868, Williams conveyed the lots in question, subject to the deed of trust, to Mrs. Moody, who, on the 17th of May, 1871, conveyed the lots to Ch. V. Dyer, subject to the trust deed; and Dyer, June 1, 1872, conveyed the lots to Jackson, still "expressly subject" to the trust deed just mentioned; and later, Jackson conveyed the property to Perkins, as trustee, to secure his debt due to Joseph Swift and Edwin Swift. This deed was dated June 1, 1872, filed for record Aug. 3, 1872; and on the same day, Aug. 3, 1872, was filed an instrument, purporting to be a release by Jackson to Ch. V. Dyer, of all the right, etc., which he, Jackson, had acquired by virtue of the trust deed given to him by Williams. This release is dated Oct. 2, 1871, but was not filed for record until Aug. 3, 1872. On the 13th of November 1876, Jackson conveyed the lots in question, by another deed of trust, to secure notes which he had given to Elizabeth Carroll and Ellen Carroll. *Held*, that the release to Dyer was a gross fraud upon the rights of Smith, the holder of the Williams (30,000) note; that all the holders of the property from Williams to Jackson were affected by notice of the lien of the trust deed to secure the note held by Smith, and that there was enough on the face of the recorded title under which the Swifts claim, and in the facts attendant upon the execution of the release, to put them upon inquiry whether the Williams note had been in fact paid; and enough to apprize them that the holder of that note could not be postponed to, or injured by the fraudulent release. *Held* further, that the Carrolls were in no better condition, and clearly affected by notice of the prior lien of the Smith ($30,000) note, and of the fraudulent character of the Jackson release; and that Smith's administratrix is entitled to a lien on the lots prior to the liens held by the Swifts or the Carrolls. *Held* further, that the statutory right of redemption, after a judicial sale, etc., is a rule of property in Illinois, and that it must be accorded in the Federal as well as the courts of the State. Brine v. Hartford Fire Insurance Co., 96 U. S. 627. Reversed. Appeal from the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice STRONG.—*Swift v. Smith.*

INSURANCE LAW OF MISSOURI—EXCEPTIONS.—Sec. 1, chap. 90, of the General Statutes of Missouri, which gives damages in actions against insurance companies for vexatious refusal to pay policies, was not repealed by act of March 10, 1869, regulating insurance companies. That section is not inconsistent with any of the provisions of the later acts, and repeals by implication are not favored. If a series of propositions are embodied in instructions, and the instructions are excepted to in a mass, if any one of the propositions is correct, the exception must be overruled. Johnston v. Jones, 1 Black. 220; Beaver v. Taylor, 93 U. S. 54. Affirmed. In error to the Circuit Court of the United States for the Eastern District of Missouri. Opinion by Mr. Chief Justice WAITE.—*Relfe v. Wilson.*

ADMIRALTY—CONTRACT.—Where a vessel is chartered by the United States as a transport, and

receives injuries in landing troops and horses, in obedience to the orders of the officer in command: *Held*, that such injuries did not constitute a "war risk," and the owner of the vessel was not entitled to damages against the government in the absence of a special contract guaranteeing him against such accidents. Affirmed. Appeal from the Court of Claims. Opinion by Mr. Chief Justice WAITE.—*White v. United States.*

JURISDICTION OF FEDERAL COURTS—ELEVENTH AMENDMENT OF THE CONSTITUTION CONSTRUED.—"Upon the authority of Cohens v. Virginia, 6 Wheat. 375; Osborn v. Bank of United States, 9 Wheat., 816; Mayor v. Cooper, 6 Wall. 250; Gold-washing and Water Co. v. Keyes, 96 U. S. 201, and Davis v. Tennessee, 100 U. S. 264, held to be settled law: 1. That while the 11th amendment of the National Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such po ver is extended by the Constitution to suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State. 2. That a case in law or equity consists of the right of one party, as well as of the other, and may properly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either. 3. That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted. 4. That, except in the cases of which this court is given, by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and, lastly, 5. That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it. 6. 'These propositions, now too firmly established to admit of, or to require, further discussion, embrace the present case, and show that the inferior court erred, as well in not accepting the petition and bond for the removal of the suit to the circuit court of the United States, as in thereafter proceeding to hear the cause. It was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal." Reversed. In error to the Supreme Court of Mississippi. Opinion by Mr. Justice HARLAN.—*New Orleans. etc. Railroad v. Mississippi.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

October Term, 1880.

LEASE—RENEWAL—CONSTRUCTION.—A provision in a lease "that if before the end of said term neither of the said parties give to the other three months' notice in writing of his intention to terminate this lease at the end of said term, the said lease shall continue in force for another term of one year; and in the same manner from year to year until one of the said parties shall determine this lease by notice in writing in the manner aforesaid, which notice shall terminate with the end of the year for which the premises are then held; and provided that either party may terminate this lease by notice in writing given three months before the termination of any one year," can not be construed as a mere covenant for renewal of the lease. Kramer v. Cook, 7 Gray, 550. Opinion by MORTON, J,—*Dix v. Atkins.*

BILL IN EQUITY TO RESTRAIN INSOLVENT CORPORATION FROM EXECUTING LEASE.—The substantial allegations of a bill in equity were that the ptaintiffs were creditors of the defendant corporation; that the corporation was insolvent; that all its property was mortgaged to a trustee for the benefit of one class of creditors; that it owed large amounts to other creditors, one of whom had attached all its property; that it was about to execute a lease to said attaching creditor for the term of nine hundred and ninety-nine years at a rental which would not pay the interest upon its indebtedness, and that the execution of said lease would be injurious to the interest of its creditors and stockholders. Prayer for an injunction and a receiver. *Held*, that the court had no jurisdiction by statute in such a case, and that the bill did not state a case within the general equity powers of a court of chancery. The allegation that the defendant corporation is insolvent does not aid the plaintiff. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation. Opinion by MORTON, J.—*Pond v. Framingham, etc. R. Co.*

STATUTE OF LIMITATIONS— PART PAYMENT—PROCEEDS OF FORECLOSURE. — 1. The ground upon which a part payment is held to take a case out of the statute of limitations, is that such payment is a voluntary admission by the debtor that the debt is then due, which raises a new promise by implication to pay it or the balance. To have this effect, it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment. Roscoe v. Hall, 7 Gray, 274; Stoddard v. Dean, 7

Gray, 387; Richardson v. Thomas, 13 Gray, 381. 2. Where, therefore, the statute was pleaded in a suit upon a note secured by mortgage, and it appeared that the maker conveyed the mortgaged premises, subject to the mortgage, which the grantees assumed and agreed to pay; that said grantees subsequently made payments of interest, which were indorsed on the note; that more than six years after said conveyance, the maker never having made any payments thereafter, the holder of the note and mortgage foreclosed the latter, and received from the foreclosure sale a balance over and above the expenses of such foreclosure and sale. which it was his intention to apply to said mortgage debt, but which in fact had never been indorsed on the note, or other paper, it was *held*, that the power to sell and appropriate the proceeds to the payment of the mortgaged debt could not fairly be construed as an authority to the mortgagee to make a new promise on behalf of the mortgagor to pay the debt, so as to avoid the statute of limitations. Opinion by MORTON, J.—*Campbell v. Baldwin.*

TITLE BY ADVERSE OCCUPATION—INTERRUPTION — QUESTION FOR JURY. — In an action of tort for breaking and entering the plaintiff's close, the defendant claimed title by adverse occupation for more than twenty years. The plaintiffs, for the purpose of showing an interruption of any adverse possession, offered the testimony of Ellis Ames, Esq.. a counselor of this court, who testified "that in August, about the year 1870, he went upon the land with one of the plaintiffs; that they went all over the land; that the land was rough and uncultivated, bushes growing upon part of it; he saw no indication that the land had been cultivated that year; that he saw no one else on the land; that they went upon the land for the purpose of discovering, if they could, any evidence of adverse occupation upon which he could bring a writ of entry against (the defendant)." The presiding judge ruled that if the facts thus testified to were true. they constituted, as matter of law, necessarily an interruption of an adverse possession of the defendant. *Held*, error. Although there may be cases in which the occupation by the true owner may be of such a nature and so continued, that it would be the duty of the court, upon the truth of such facts being apparent, to rule, as matter of law, that the adverse possession had been interrupted, still the general principle is that it is a question for the jury to determine whether in fact the adverse possession has been continuons or has been interrupted. Brickett v. Spofford, 14 Gray, 518, explained. Opinion by LORD, J. — *Bowen v. Guild.*

RESTRICTION IN DEED—EQUITY—INJUNCTION. —A restriction in a deed, "that no building erected on the said land fronting on said A street, or on Clarendon or Berkeley streets, shall be less than two stories in height, exclusive of the basement, or have exterior walls of any other material than brick, stone or iron, or be used for a stable or for any other mechanical or manufacturing purpose; and that no building shall be erected on the said land within ten feet of said A street," will not authorize the court of equity to restrain the defendant from building upon the line of said A street a brick wall six feet in height with a coping on said wall not exceeding one foot in height. to be used as a fence or wall. Opinion by MORTON, J.—*Nowell v. Boston Academy of Notre Dame.*

MALICIOUS PROSECUTION — TERMINATION OF PRIOR SUIT — NOLLE PROSEQUI.—4. As matter of law, the termination of a prosecution by the entry of a *nol. pros.* is not necessarily such a termination of the suit as entitles the defendant to maintain an action for malicious prosecution. Whether a prosecution has been so terminated as to authorize such action, is to be determined by the facts of the particular case, of which facts the entry of a *uol. pros.* may be one of several, may be the only fact. may be a controlling fact, of may be an entirely unimportant one. 2. In an action for malicious prosecution the plaintiff averred that, upon a complaint made by the defendant, he was held for appearance before the superior court at the term holden on the third Monday of December, 1872, and that authenticated copies of the complaint and warrant and proceedings thereon were entered upon the docket of that court; and that at such term the grand jury found no bill against him, and that on the 26th day of said December he was discharged from custody under such complaint by order of the superior conrt; and that the district-attorney at the corresponding term of the court, a year afterwards, entered a *nol. pros.* The defendant demurred. *Held*, that the demurrer must be overruled. The fact of the entry of a *nol. pros.* may or may not be important. If, in point of fact, it shall appear that the grand jury found no bill, and by reason thereof the court ordered the discharge of the party at the same term of the court, it is difficult to understand what legitimate results would follow from the subsequent entry of a *nol. pros.*, or how the rights of a party discharged a year before that entry could be affcted. It is sufficient of the plaintiff in his declaration states facts upon which. if proved, he would be entitled to a verdict. We think he has stated such facts in his declaration. Parker v. Farley, 10 Cush. 279, explained. Opinion by LORD, J.—*Graves v. Dawson.*

SUPREME COURT OF KANSAS.

December, 1880.

LIABILITY OF RAILROAD FOR KILLING ANIMALS — HERD LAW.—In a herd law county an animal belonging to plaintiff strayed upon the railroad track of defendant and was killed by one of its trains. The track was unfenced. Plaintiff had picketed the animal in an enclosed field, and

had taken reasonable precautions to keep it confined and prevent it from running at large. It had broken loose without any fault or neglect on his part. *Held*, that the company was liable for the value of the animal. Opinion by BREWER, J. All the justices concurring.—*Kansas, etc. R. Co. v. Wiggins.*

SALE OF PERSONALTY—EVIDENCE OF GOOD FAITH.—1. A party claiming under a purchase of personal property, without taking actual possession, offered to prove by his own testimony, as a reason for not taking possession of the goods and chattels, which were in use in a hotel, "that several railroad men boarding in the hotel came to him and begged him not to turn them out, saying they could not get shelter for their families at the time in any other house in the town." *Held*, as it was essential to the sale to establish that it was made in good faith, the evidence was admissible to account for the failure of the purchaser to take actual possession, and as tending to prove the good faith of the sale. 2. Upon the trial of a replevin action, where the title of the property was in controversy, and plaintiff's claim contested by attaching creditors on the ground that his purchase was not made in good faith and for a sufficient consideration (no actual possession having been taken), a witness was permitted to testify, over the objection of plaintiff, that at the time of the levy, the seller of the property to the plaintiffs was in the office of the hotel, where the property was in use, and acted as if he had charge and custody of the house, and seemed to be as much interested and excited as the plaintiff." *Held*, not error; the evidence, being a compound of fact and opinion under the circumstances of this case, was admissible. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*Locke v. Hedrick.*

SET-OFF—WHAT IS A CAUSE OF ACTION EX CONTRACTU.—1. The decision in Fraker v. Cullum, Receiver, etc., 21 Kansas. 555, re-affirmed. 2. A claim under section 5,198, of the United States Revised Statutes, to recover double the amount of usurious interest paid to a national bank, is not a cause of action founded upon contract and can not be set-off in an action by the bank upon a note other than that upon which the usurious interest was paid. Reversed. Opinion by BREWER, J. All the justices concurring.—*Fraker v. Cullum.*

HOMESTEAD PRE-EMPTION — CONFLICTING RAILROAD LOCATION.—The plaintiff was a beneficiary of the grant made by act of Congress of date March 3, 1863, granting lands to the State of Kansas to aid in the construction of certain railroads. The line of its road was definitely located and fixed in and through the County of Rice on December 10, 1870. But no order was made by the secretary of the interior, withdrawing lands along such line from sale and the operation of the inter-homestead and pre-emption laws until February 13, 1871. *Held*, that title passed on December 10, 1870, and that a settlement by defendant on a tract of land within the limits of the grant, made between December 10, 1870, and February 13, 1871, gave to the latter no right to homestead or pre-empt the land. Reversed. Opinion by BREWER, J. All the justices concurring. — *Atchison, etc. R. Co. v. Bobb.*

CONTRACT TO MAKE DEED--PERFORMANCE.--In an action brought by the payee against the makers upon the following written contract, viz: "$500. Hutchinson, Kas., February 5, 1878. Thirty days after the execution and delivery to us by R. E. Fletcher, of a good and sufficient deed of warranty of the following described real estate, situate in Reno County, Kansas, to-wit: the n. e. qr. of sec. 10, in town twenty-three (23). range 5, (5), west, we promise to pay said R. E. Fletcher, $500. J. McMurry, C. McMurry, A. McMurry." *Held*, the delivery or tender of a good and sufficient deed of warranty of the real estate to the makers, a condition precedent to any right of recovery, and *held, further*, the tender of a deed running to J. & C. McMurry & Co., as grantees, not a compliance with the contract. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*McMurry v. Fletcher.*

CONSTITUTIONAL LAW—TITLE OF ACT.—1. Sec. 16, art. 2, of the Constitution is mandatory, not merely in requiring that the subject matter of an act shall be clearly expressed in its title, but also in requiring that the act shall contain only one subject. But while this section should be enforced so as to guard against the evils designed to be remedied by it, it should not be construed narrowly or technically, to invalidate proper and needed legislation. 2. The subject matter of sec. 31, ch. 72, of the laws of 1873, so far as it creates an unorganized county into a municipal township of the county to which it is attached for judicial purposes, is clearly expressed in the latter part of the title to the act, and that subject is not so foreign to the other matter of the act as to justify the court in adjudging it unconstitutional and void. Judgment for plaintiff. Opinion by BREWER, J. All the justices concurring.—*Philpin v. McCarty.*

HOMESTEAD PRE-EMPTION — CONFLICTING RAILROAD LOCATION. — 1. A homestead entry, made before the definite location of the railroad, but which had been voluntarily abandoned before such definite location, although the filing thereof was not canceled until after location, did not operate to except the land from the grant to the railroad company under the provisions of the act of Congress of March 3d, 1863, donating to the State of Kansas lands to aid in the construction of certain railroads and telegraphs. 2. The land in controversy—a part of an odd numbered section and within the ten mile grant of land to the Atchison, etc. Railroad Company by virtue of the act of Congress of March 3d, 1863—was in 1863 public land open to homestead settlement; in October, 1863, one R homesteaded it; in 1868 he voluntarily abandoned it; in June, 1869, the

line of the railroad of the Atchison, etc. R. Co. was definitely located opposite to this land. At the time of such definite location, the land was abandoned, but the entry or filing of R's homestead was uncanceled; on November 3d, 1869, a withdrawal of lands was made under the act of March 3d, 1863, within the limits of which withdrawal the land was situate; in May, 1874, the land was certified to the State of Kansas, and in February, 1875, patented by the State of Kansas to the railroad company; in October, 1871, one S had R's entry canceled, and then homesteaded the land himself, S's entry was, on the application of the railroad company, afterwards canceled, but on August 14th, 1878, reinstated by the Secretary of the Interior under the provisions of the act of Congress of April 21st, 1878, and on April 2d, 1879, a patent was issued to S. *Held*, that the title to the land vested in the railroad company in June, 1869; that the entry of S was erroneously reinstated; that the title of the railroad company to the land could not be disturbed by an act of Congress subsequent to June, 1869; and that the decision of the land department awarding the land to S in 1878 by a mistake of law, was not conclusive. Reversed. Opinion by HORTON, C. J. All the justices concurring. — *Emslie v. Young*.

SUPREME COURT OF OHIO.

December, 1880.

GUARANTY—STATUTE OF FRAUDS—CONSIDERATION.—1. A let a contract to B, for furnishing materials and building a house for a stipulated sum. B employed C to furnish materials and to perform the labor of plastering. When the building was completed, except a small part of the plastering, C, in the absence of B, informed A that he would not finish the plastering unless A would agree to pay him; and A replied, "Finish the plastering and I will see you paid." The obligations of B to complete the house and to pay C, not being released: *Held*, that the verbal promise of A to see C paid, was within the statute of frauds. 2. The fact that there was due from A to B, at the time the promise was made, a sum sufficient to pay the balance to C, did not take the promise out of the statute. 3. In an action by C against A upon such promise, issue being joined by a general denial, it was competent for A to rely upon the statute of frauds. Judgments of the district and common-pleas courts reversed, and cause remanded to court of common pleas for further proceedings. Opinion by MCILVAINE, C. J.—*Birchell v. Neaster*.

JUDGMENT OF DISMISSAL—ESTOPPEL.—In an action on a promissory note, the maker is not estopped from setting up want of consideration or fraud, by a judgment dismissing his petition on the merits, in an action brought to enjoin the negotiation of the note and to obtain its surrender and cancellation, although the matter set up as a defense was relied on as the ground of relief in the petition. Judgment of the district court reversed, and that of the common pleas affirmed. Opinion by WHITE, J.—*Cramer v. Moore*.

HUSBAND AND WIFE — EVIDENCE — COMPETENCY.—Under section 314 of the Code of 1853, as amended April 18, 1870 (67 Ohio L. 111), which provides: "The following persons shall be incompetent to testify: * * * * 7th.—Husband and wife concerning any communication made by one to the other during coverture, or any act done by either in the presence of the other during coverture, unless such communication was made, or such act was done within the known presence, hearing or knowledge of a third person competent of being a witness," etc. *Held*, that a husband or wife, called to testify to such communication or act, is competent to testify as to the known presence, hearing or knowledge of such third person. Judgment of the district court is so modified as to hold the deed of conveyance from Thomas Miller to Joseph C. Thoms, of October 26, 1868, valid as an indemnity to Catharine Miller against the mortgage executed by her and her husband, upon her own estate, to ——— Hamilton, and for no other purpose. In all other respects the judgment of the district court is affirmed. Costs on error to be divided equally between the parties. By the COURT.—*McCague v. Miller*.

WAGERING CONTRACT — RESCISSION — BAILMENT.—In August, 1872, C sold and delivered to H a horse, upon his written contract to pay therefor $140, one day after G should be re-elected President of the United States; but if G was not re-elected, then the obligation was to be void. Before the election, H returned and tendered back the horse, in as good condition as when received, and demanded his contract; but C refused to receive the horse or surrender the contract. Thereafter, H kept the horse as bailee of C. After the election, at which G was re-elected President, C demanded the contract price of the horse, and, on refusal by H to pay, but while he was ready and willing to return the same, brought an action under the act of 1831 (1 S. & C. 664), to recover the value of the property. *Held*, 1. That the transaction was a wager within the meaning of said act, and the contract was void. 2. That H might, before the election took place which was to determine the wager, rescind the contract by surrendering back the horse. 3. After such refusal to take back the property, H might elect to hold the property as bailee of C, and he is not liable under the statute for its value, unless it appears that, at the time the action was commenced, he had refused to deliver him back, or done some act amounting to a conversion of the property to his own use. Judgment of the common pleas and district court reversed, and cause remanded. Opinion by JOHNSON, J.—*Harper v. Crain*.

CORPORATION — STOCK AS COLLATERAL — TRANSFER. — The plaintiff and defendant were banking corporations, organized under the act of

March 21, 1851, to authorize free banking. 1 S. & C. 168. The plaintiff loaned to F, President of the defendant, $10,000, on his individual account, and received as security for the loan a certificate, owned by F, of two hundred shares of the capital stock of the defendant, of the par value of fifty dollars each. The plaintiff presented said certificate to the defendant, at its place of business, and demanded a transfer of said shares to the plaintiff, on the books of the company, which was refused; whereupon the plaintiff brought an action against the defendant for the conversion of said stock, founded on said refusal to transfer the same to the plaintiff. *Held*, that the plaintiff was not entitled to said transfer, and, consequently, that the defendant was not liable for refusing to make or permit it. Judgment affirmed. Opinion by BOYNTON, J.—*Franklin Bank v. Commercial Bank.*

PRACTICE UNDER THE CODE — PLEADING — EQUITABLE DEFENSE.—1. In an action under the Code for the recovery of real estate, whereof the legal title is in the plaintiff, a defense, grounded on an equitable title and right of possession under it in the defendant, must be pleaded. 2. In such case, where the answer contains a general denial of the plaintiff's title merely, it is error to admit testimony of such equitable estate in the defendant, and to charge the jury that such equitable estate, if duly proved, constitutes a defense to such action. Judgment of the district and of the common-pleas courts reversed, and cause remanded. Opinion by MCILVAINE, C. J.—*Powers v. Armstrong.*

RECENT LEGAL LITERATURE.

NEBRASKA REPORTS. Vol. X. By Guy A. Brown, official reporter. State Journal Company, Lincoln, Nebraska. 1880.

In this volume of his reports Mr. Brown suggests a new departure with reference to the index of reports which is worthy of the attention of the profession. In his preface, he says: "The index to a volume of reports is usually made by grouping together the *syllabi* of cases under appropriate titles, and making necessary cross references. Such an index occupies nearly one-tenth of every volume of reports. I can not see the utility in thus merely repeating the *syllabi*. It seems to me that the object for which the index is made can be obtained by a different method, where the attention of the reader is merely challenged to what the court has passed upon, giving the page where the case with its syllabus may be found.' In order to test the sense of the profession on this topic he has printed in this volume two indices, one of which is framed upon the old plan, and the other in pursuance of his suggestion; and he invites the criticism of his readers. Without question the preference should be accorded to the method proposed by Mr. Brown. Such an index occupies far less space, and if properly and carefully made, would be much more serviceable than the one in vogue. The old method is very crude, and as we shrewdly suspect is simply a labor saving make-shift of the reporters. We congratulate Mr. Brown upon his new departure, and trust that it will meet the approval of the profession.

NOTES.

A late number of the *Revue Scientifique*, of Paris, gives some interesting statistics of crime in Europe. Portugal has just published an official report showing that the number of convictions for crimes and misdemeanors of all sorts in that country during the year 1878, was 10,472, or 0.22 for each 100 inhabitants. The convictions for heinous offences against the person, such as parricides, assassinations and infanticides, were in the proportion of 3.22 for every 100,000 inhabitants. The account of the acquitted and condemned of those accused for the same year stood as follows: Acquitted.—France, per cent. 20.63; Italy, 24.00; Spain, 25.80; Belgium, 27.20; England, 29.40; Portugal, 37.34. Condemned.—France, per cent. 79.37; Italy, 76.00; Spain, 74.20; Belgium, 72.80; England, 70.60; Portugal, 62.66. It appears that the greatest number of crimes are committed by persons between the ages of twenty and thirty years. The distribution according to age, and by the per cent., stands as follows: under 14 years, 2.27; from 14 to 20, 12.25; from 20 to 30, 34.72; from 30 to 40, 23.77; from 40 to 50, 14.52; from 50 to 60, 7.66; above 60, 3.64; unknown ages, 1.12. Dividing the convicts into those who could read and those who could not, the account stands thus: Knowing how to read—Germany, per cent., 95; France, 68; England, 66; Belgium, 61; Italy, 31; Portugal, 30; Spain, 27. Not knowing how to read: per cent.—Germany, 5; France, 32; England, 34; Belgium, 39; Italy, 69; Portugal, 70; Spain, 73. The per centage of crime in the various pursuits of life was as follows: Farmers, per cent.: 41.10; manufacturers and other operatives, 34.23; merchants, 4.06; landed proprietors, 9.91; Government agents and soldiers, 1.75; servants, 3.85; other professions, 2.17; without callings, 1.64; unknown callings, 1.34.

——"Guilty or not guilty?" asked a Galveston justice of the peace of a colored culprit, who was accused of stealing a whole line full of linen. "Dat 'ar 'pends on circumstances. Ef you is gwine to lemme off wid a repriman', like las' time, den I owns up to six shirts, foah pillyslips, and about a dozen udder pieces; but ef you is gwine to sock it to me, den, sah, I calls for a july to windicate myself, so I can sue for $40,000 damages." "I'll enter the plea of not guilty." "I say, boss, of you will lemme of wid de repriman', I'll plead guilty to dis full offense, and five chickens I pulled las' week, and a wood-pile I's gwine to inspect ter-night."